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No. 98-1480

Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT A. BECK, II,

Petitioner,

vs.

RONALD M. PRUPIS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX
VOLUME II, PAGES 234 TO 468

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 91-8121-CIV-ROETTGER

ROBERT A. BECK, II

Plaintiff,

vs.

RONALD M. PRUPIS, et al.,

Defendants.

_____/

PLAINTIFF ROBERT A. BECK, II'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS A GENUINE ISSUE TO BE TRIED, IN OPPOSITION TO THE NEW JERSEY GROUP'S MOTION FOR SUMMARY JUDGMENT

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SUMMARY

In its Statement of Material Facts, the New Jersey Group,[1] selectively quotes and distorts various facts, in an attempt to make a massive RICO conspiracy look like an innocent corporate affair. The New Jersey Group's effort, however, is nothing more than a repeat of the legal arguments previously raised in its unsuccessful Motion to Dismiss. As there is substantial evidence supporting all of plaintiff Robert A. Beck, II's ("Beck") allegations, at minimum, genuine issues of material fact remain.

Amazingly, in once again arguing that Beck lacks standing to assert his claims, the New Jersey Group's Statement of Material Facts ignores the substantial evidence of the predicate acts committed directly against Beck. For example, Beck asserts as predicate acts that he was fraudulently induced by the New Jersey Group and others to extend an unsecured loan to the New Jersey Group's enterprise, to purchase stock in the New Jersey Group's enterprise and to refrain from selling it, and to personally guaranty a $7.5 million loan to that enterprise. The damages that Beck suffered by reason of these predicate acts are classic RICO damages for which he has standing.

THE ALLEGATIONS

This is an action by Beck under "RICO," 18 U.S.C. § 1961 *et seq.*, for a pattern of racketeering activity committed by the defendants, former officers and directors of

[1] The New Jersey Group refers to defendants Leonard Bellezza, William Paulus, Jr., Ernest Sabato and Harry Olstein.

Southeastern Insurance Group, Inc. ("SIG" or the "Enterprise"), by reason of which Beck has directly suffered damages.

Beginning in or around the fall of 1985, the defendants devised a scheme and artifice to defraud Beck and others and, in addition, used their positions at SIG to extort potential customers. Complaint at ¶¶11-13 (Exhibit 1); Beck's RICO Case Statement at 1 (Exhibit 2). As part of this scheme and artifice to defraud, the defendants fraudulently induced Beck to make an unsecured loan to the Enterprise, to purchase stock and invest in the Enterprise and refrain from selling that stock until it was too late, and to be a personal guarantor on a $7.5 million loan to the Enterprise. Complaint at ¶¶14-15, 61-78; RICO Case Statement at 5, 11-12. Moreover, when Beck became a threat to the continued racketeering conduct of the defendants, the defendants fraudulently created causes for Beck's termination. Complaint at ¶¶12-13 and 43-60; RICO Case Statement at 3.

The defendants' racketeering activity included mail and wire fraud and extortion, within the context of the following:

(a) Falsifying financial statements (Complaint at ¶¶18-19 and 22; RICO Case Statement at 2, 5);

(b) Looting the Enterprise (Complaint at ¶¶20-21, 33-35 and 37-41; RICO Case Statement at 3);

(c) Extorting contractors (Complaint at ¶¶23-30; RICO Case Statement at 2);

(d) Set aside fraud (Complaint at ¶31; RICO Case Statement at 5-6);

(e) Fraudulent promises to indemnify (Complaint at ¶32; RICO Case Statement at 6); and

(f) Attempted options fraud (Complaint at ¶36; RICO Case Statement at 3).

Approximately 50 predicate acts are set forth in detail in the Complaint in order to fulfill RICO's pattern requirement.

PROCEDURAL HISTORY

Beck initially filed a state court complaint in Florida Circuit Court, alleging a wrongful termination claim against SIG, defamation, and state RICO claims against the New Jersey Group and others based *solely* upon Beck's status as a terminated whistleblower. *See* Beck's Florida Circuit Court Complaint (Exhibit 3). The New Jersey Group filed a motion to dismiss Beck's claims, arguing that Beck did not have standing. Based on *Shearin v. E.F. Hutton*, 885 F.2d 1162 (3d Cir. 1989), the Florida Circuit Court granted the motion as to the substantive RICO claims, but denied it as to the RICO conspiracy claims.[2] Beck's state RICO claims were based solely upon

[2] Truly shocking is the New Jersey Group's reference to the Florida trial court's award of attorneys' fees against Beck. The Third District Court of Appeal reprimanded counsel for the New Jersey Group for even making the motion for fees, and, in its opinion reversing the trial court, the Third District Court of Appeal held that Beck had substantial basis for his action. *See Beck v. Olstein*, 588 So.2d 317, 318 (Fla. 3d DCA 1991).

Beck's standing as a whistleblower, as that was the only claim in existence at the time.

In or about early 1990, SIG was placed into bankruptcy as a result of the defendants' racketeering conduct. At approximately the same time, the shareholders of SIG filed a derivative suit in New Jersey District Court, copying virtually all of the allegations of racketeering conduct directly from Beck's Complaint. The shareholders named the same defendants as Beck's Florida Circuit Court action, with one addition – they also named Beck as a defendant. Beck unsuccessfully attempted to move that claim to Florida. Subsequently, as Beck did not want to litigate the identical complex RICO issues in two separate forums, he voluntarily dismissed his RICO claim in Florida Circuit Court and re-alleged it as a Crossclaim in New Jersey. There was no forum shopping involved (as the same substantive law was applicable wherever the action was pending).[3] In addition, the basis for *new* RICO substantive claims had ripened.

Subsequently, the New Jersey District Court severed Beck's Crossclaim and transferred it to this Court. Since that time, counsel for the shareholder plaintiffs in New Jersey were disqualified and, without counsel, that claim

[3] Contrary to the allegation of the New Jersey Group in its Statement of Material Facts at 4, the Eleventh Circuit has never held that discharged employees who were threatening to blow the whistle did not have standing to sue for RICO damages. *See* Beck's Memorandum of Law in Opposition to the New Jersey Group's Motion to Dismiss (copy attached as Exhibit 7); Beck's Memorandum of Law in Opposition to the New Jersey Group's Motion for Summary Judgment.

was voluntarily dismissed. This was the only reason for the dismissal of the shareholders' suit.

In August of 1989, the Florida Department of Insurance ("FL-DOI") filed three actions against the New Jersey Group and others for various acts, including civil theft (the FL-DOI's Complaints are attached as Exhibits 4, 5 and 6). These actions were settled by the New Jersey Group, but the Settlement Agreement has been withheld from Beck in this action.[4]

In the New Jersey Group's Statement of Material Facts at 7, a chart is attached, which purportedly demonstrates the similarities between several of the previously filed suits and the instant suit by Beck. Of course, some of the predicate acts pled by Beck in the instant case were the subject of other lawsuits. Beck does *not* seek any damages resulting from *those* predicate acts. They are pled in the instant case merely to satisfy RICO's pattern requirements. Cleverly omitted from the New Jersey Group's chart, however, are the predicate acts by which Beck directly suffered injury and for which Beck has standing to sue – namely, the defendants' fraudulent inducement of Beck to extend and guaranty loans to their Enterprise, the defendants' fraudulent inducement of Beck to purchase stock in their Enterprise and refrain from selling it, and the defendants' fraudulent creation of causes to terminate Beck. None of the actions brought by any other party sought damages for these injuries, nor

[4] The Settlement Agreement and the sworn statements executed in connection with those statements are the subject of a pending Motion to Compel.

could they, for they are particular to Beck. These injuries form the heart of the instant case.

In the instant action, the New Jersey Group filed a Motion to Dismiss, which raised the identical arguments that are raised in the present Motion for Summary Judgment. After consideration of Beck's Memorandum in Opposition to this Motion to Dismiss (Exhibit 7), this Court denied the Motion. *See* Order denying New Jersey Group's Motion to Dismiss (Exhibit 8).

I. EVIDENCE OF THE PREDICATE ACTS COMMITTED DIRECTLY AGAINST BECK.

In its Statement of Facts at 8, the New Jersey Group mischaracterizes Beck's action as being for the loss of certain investments and loans. On the contrary, at the heart of Beck's action are the predicate acts that were committed directly against him, by which he directly suffered damages. Specifically, these are as follows:

1. The defendants' fraudulent inducement of Beck to extend a $150,000 loan to the defendants' Enterprise;

2. The defendants' fraudulent inducement of Beck to personally guaranty a $7.5 million loan to the defendants' Enterprise;

3. The defendants' fraudulent inducement of Beck to purchase stock in the defendants' Enterprise and fraudulently causing him to fail to sell his stock until it was too late; and

4. The defendants' fraudulent creation of causes for Beck's termination due to his threat to their continued racketeering conduct.

These are the predicate acts by which Beck was directly damaged and for which Beck is suing the defendants, including the New Jersey Group. There is substantial evidence supporting each of these predicate acts. By selectively citing to sections of the cross-examination of Beck's deposition dealing with the demise of SIG, rather than the fraudulent inducement of Beck, however, the New Jersey Group attempts to mislead the Court into believing that this evidence does not exist. For example, the New Jersey Group ignores the following testimony from Beck:

> Q. Were you hurt because you lost the value of your investment in SIG? Is that how you were hurt as a result of what you are telling us?
>
> A. I was hurt because information was withheld from me and had I had that information I could have prevented losses to myself and to others. I could have prevented the loss on signing the First Fidelity guarantee. I could have prevented the loss that I suffered due to the loss of my employment. I could have prevented the loss and the value of the stock. I could have prevented the loss that came about from the unsecured loan.
>
> I could have prevented all the damages had all these things that have been withheld from me not been withheld from me.

February 7, 1995 Deposition of Beck at 33-34 (Exhibit 9). *See also* January 5, 1995 Deposition of Beck at 72-73 ("This was vital information which was withheld from me") (Exhibit 10).

A. <u>The Defendants' Fraudulent Inducement Of Beck To Extend A $150,000 Loan To The Defendants' Enterprise.</u>

The first RICO predicate act committed by the defendants directly against Beck occurred in 1986, when the defendants fraudulently induced Beck to extend a $150,000 loan to their Enterprise and also to purchase some stock therein. This fraudulent inducement was in connection with a private offering that commenced in the Spring of 1986. At that time, Beck was told both orally and in writing, through the mails, that he would continue to be the Chief Executive Officer of SIG after the offering and, as such, be in charge of the company. These representations were even included in the Private Placement Memorandum at 42 (Exhibit 11).

Believing these representations, Beck extended a $150,000 unsecured loan to SIG and invested an additional $75,000 (to purchase SIG stock). February 6, 1995 Deposition of Beck at 113 (Exhibit 12). If not for his reasonable belief that he would continue to be the Chief Executive Officer of the company, Beck would never have invested. January 6, 1995 Deposition of Beck at 63-64 (Exhibit 13).

Unbeknownst to Beck, the defendants had already decided that Beck would not continue as the Chief Executive Officer of SIG. *See, e.g.*, Deposition of Waldron at 58-59 (Exhibit 14) (she knew from another defendant that Beck would not continue as Chief Executive Officer of SIG after the offering). The statements made to Beck by the defendants were, thus, knowingly false and fraudulent.

The Private offering closed on August 11, 1986. A meeting was held on August 18, 1986, exactly one week after the close of the offering. Deposition of Waldron at 16, 49-50. At this meeting, the defendants officially decided that Beck would no longer continue as the Chief Executive Officer of SIG. Deposition of Westling at 174-76 (Exhibit 15); Deposition of Bailey at 24-25 (Exhibit 16); Deposition of L. Burton at 148-50 (Exhibit 17).

In addition, the defendants fraudulently hid from Beck some of the illegal manner in which they were already operating their Enterprise. Specifically, the New Jersey Group and other defendants fraudulently hid from Beck fraudulent representations they had made to indemnify contractors in order to enable these contractors in which they had an interest to get bonds. *See* Section II(D), *infra*. Had Beck known of these fraudulent promises to indemnify, he would not have extended the $150,000 loan nor invested the additional $75,000 in SIG. February 7, 1995 Deposition of Beck at 31-34 (Exhibit 9).

B. The Defendants' Fraudulent Inducement Of Beck To Personally Guaranty A $7.5 Million Loan.

As to Beck's personal guaranty of the $7.5 million loan, Beck's RICO Case Statement at 3-4 provides the following:

> *Fraudulent Inducement To Execute Personal Guaranty:* In or around November and December of 1987, [the] defendants conspired to and did fraudulently induce Beck to personally guaranty a $7.5 million loan from First Fidelity

> Bank to SIG. The loan was needed by the defendants to continue their racketeering conduct. . . .
>
> To further fraudulently induce Beck to enter into this personal guarantee, [the] defendants conspired to and did employ false and misleading statements and omissions to cause Beck to believe that his employment contract would continue to be honored. However, the defendants had no intention of honoring Beck's contract, as they had already embarked on their criminal conduct and their associated scheme of creating fraudulent causes for Beck's termination and creating a scapegoat for their illegal conduct.
>
> To further fraudulently induce Beck to enter into this personal guaranty, [the] defendants conspired to and did utilize fraudulent financial information to cause Beck to believe that SIG was in a much better financial position than it actually was. Had Beck known: (1) the true financial condition of SIG, (2) the illegal activities committed by the defendants, or (3) the plans to terminate him and use him as a scapegoat, he would not have executed the personal guaranty.

There is substantial evidence supporting all of these points, all of which is ignored by the New Jersey Group.[5]

---

[5] Contrary to the New Jersey Group's bald assertion in its Statement of Facts at 15, Beck never claimed that Lampf Lipkind's malpractice was the *sole* cause of Beck's execution of the guaranty. Beck was forced to pursue that action to mitigate his RICO damages suffered as a result of the New Jersey Group's conduct. The applicable standard in the action against Lampf Lipkind was that the malpractice was a substantial contributing cause. In fact, at all times, Beck continued to

1. The fraudulent financial information.

As part of their racketeering conduct, the New Jersey Group, together with others, falsified SIG records and financial statements, resulting in a material overstatement of the value and net income of SIG and its subsidiaries. As the New Jersey Group intended, Beck relied on the fraudulently created financial statements and estimates in his assessment of the likelihood that SIG would be able to repay the First Fidelity loan. As such, Beck was fraudulently induced to guaranty the loan.

Specifically, the New Jersey Group and others caused SIG to treat claims made by Chief Structures, Inc. ("Chief") as a "workout," where claims payments made by SIG (an expense) were fraudulently portrayed as "notes receivable" (an asset). Loss reserves for future claims payments were neither established nor reported. *See* Deposition of L. Burton, pp. 76-80 and 215-18 (Exhibit 17). This resulted in the fraudulent overstatement of the financial condition of SIG by millions of dollars.

The evidence of the Chief saga is substantial. In the Summer of 1987, SIG was notified by Chief's owner, Steve West ("West"), that Chief would be unable to meet its obligations under construction contracts for which SIG's subsidiary ("SCI") had provided bonds. *See* Verified Complaint, *SCI v. Chief, et al.*, Case Number 88-7376, Palm Beach County, Florida, ¶¶ 6-8 (Exhibit 19). This created a

---

maintain that other fraudulent conduct, specifically by the New Jersey Group as detailed herein, was a concurrent proximate cause of Beck's damages, the majority of which are still outstanding. *See* March 28, 1991 Affidavit of Beck (Exhibit 18).

claim against the bonds which had been previously issued by SCI.[6] *Id.* Chief requested that SIG provide funds to keep the projects from going into default. *Id.*

Thereafter, West requested additional bonds. Affidavit of R. Prupis at 4 (Exhibit 20). SCI's underwriter determined that Chief would need to post collateral or produce an additional indemnitor to qualify for the new bonds. *Id.* To accomplish this, Bellezza agreed to sign a general indemnity agreement to enable new bonds to be issued to Chief by SCI. Deposition of Kryszak at pp. 91-92 (Exhibit 21); Affidavit of R. Prupis at 5. Because the profit participation fees could not be paid to Bellezza directly without violating insurance laws, Construction Performance Corporation ("CPC"), a SIG affiliate, was used as a front. Deposition of Day at 100-18 (Exhibit 23). Bellezza never executed this general indemnity agreement. Affidavit of R. Prupis at 5.

Bellezza, Paulus and others drafted an agreement for West to execute. Deposition of L. Burton at 102-03; Affidavit of R. Prupis at 4-5. This agreement provided:

> 1. West and Chief would form a new entity – 10% of the shares would be owned by CPC, which would elect one half of the Board of Directors;

---

[6] Bellezza was in charge of working out all claims and had specific responsibilities (together with Paulus and others) in connection with Chief, *See* Affidavit of R. Prupis at 6-7 (Exhibit 4); Transcript of October 26, 1987 SIG Board of Director's Meeting at p. 5-6 (Exhibit 22). Other members of the New Jersey Group were all similarly responsible for various areas of the claims process. *Id.*

2. CPC would provide financial guarantees to SCI in order for SCI to issue the new bonds to Chief;

3. CPC would "arrange" for funds to be loaned to Chief-FL, to complete projects bonded by SCI;

4. Bonds issued prior to the agreement would be classified as Group A bonds and new bonds issued after the agreement would be classified as Group B-Bonds; and

5. CPC would receive 50% of the profits on all bonds in Group B and the Civic Centre project, but not less than $500,000.

September 10, 1987 Joint Venture Agreement (Exhibit 24).

The profit participation of CPC on construction projects bonded by SCI was a requirement for the surety bonds to be issued. Deposition of Westling at 89-90, 129, 137-40 (Exhibit 15); Deposition of Day at 87-90. The CPC fees were payable in addition to the premium payable to SCI. Deposition of Day at 112, 117-18. These CPC fees thus constituted an illegal and excessive premium in direct violation of insurance laws. *Id.* at 100-18.

West was extorted and coerced into agreeing to pay the illegal and excessive premiums to CPC. Furthermore, the arrangement of loans by CPC to Chief was a sham of CPC "fronting" for the SIG insurance subsidiaries, which actually did advance funds to Chief. Such loans were, however, prohibited under Florida insurance law. *Id.;* Deposition of M. Burton at 246-49 (Exhibit 25). Memo from Pershes to Lipkind (cc: Bellezza) (Exhibit 26).

The September 10, 1987 Joint Venture Agreement was executed at a time when there were claims and losses on the prior bonds to Chief (the A-bonds). *See* Deposition of L. Burton at 78-84; Deposition of Westling at 90-93; September 10, 1987 Joint Venture Agreement at p. 1. This agreement therefore allowed the New Jersey Group to hide the losses, and actually characterize them as an asset.

Prior to the closing of the First Fidelity loan, no report had been made of any claim on the Chief bonds. In fact, two Claims Summaries (Exhibit 27 and 28) were mailed to Beck and others at or around that time. There was no listing of the Chief bonds in these Claims Summaries. These Claims Summaries were also used to reflect the losses and reserves in the September 30, 1987 financial statements of SIG and its insurance subsidiaries. This information was not known by Beck. Affidavit of Beck at ¶3 (Exhibit 18).

The omission of the Chief claims was a material fact. The Chief claims eventually amounted to paid losses for SIG in excess of $6 million. *See* Claims Balance Report (Exhibit 29).

Thus, through the fraudulent misrepresentations of the New Jersey Group and others, Beck was unaware of the following material facts when he executed the First Fidelity guaranty:[7]

---

[7] In its Statement of Facts at 16, the New Jersey Group distorts the contents of Beck's deposition. While Beck was aware of some aspects of the Chief transaction, the New Jersey Group conveniently omits the portions of Beck's deposition that

1. The September 10, 1987 Joint Venture Agreement existed.

2. Chief was in reality a claim and a loss to SIG.

3. The Claims Worksheets did not include a significant claim. In fact, Chief was SIG's largest claim.

4. SIG had changed its policy and was handling claims situations by issuing new bonds to defaulting contractors in hopes that they would work their way out of their claims against SIG.

5. The SIG financial statements fraudulently overstated the value of SIG by $3-6 million.

Affidavit of Beck at ¶3. Had Beck known of these facts, he would not have executed the personal guaranty. *Id.*; January 5, 1995 Deposition of Beck at 75; 125-27.

2. The fraudulent concealment of information regarding the illegal manner in which SIG was operated.

In early 1987, the New Jersey Group and others conspired to create a separate corporation, CPC, in order to cover up the illegal manner of operating SIG. Deposition of Westling at 18-23; Deposition of Day at 87-131 (Exhibit 23). CPC was established for the purpose of extorting

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detail the material aspects of the transaction that were withheld. *See* January 5, 1995 Deposition of Beck at 71-76, 125-27 (Exhibit 10); January 6, 1995 Deposition of Beck at 31-33 (Exhibit 13); Report of McClellan at 8 (and cites therein) (Exhibit 30).

contractors applying for surety bonds from the SIG insurance subsidiaries. *Id.* Deposition of Marshall at 47-50 (Exhibit 31). This was done by forcing the contractors to pay illegal fees (from 50% to 300% of the bond premium) to CPC to qualify for surety bonds, in addition to the surety bond premium payable to the SIG insurance subsidiaries. *See* Deposition of Westling at 180; Deposition of Day at 105-08.

Contractors seeking bonds from the SIG insurance subsidiaries were threatened (extorted) that, unless they agreed to pay these illegal fees to CPC, the bonds would not be issued. Deposition of Westling at 194; Deposition of Broder at 86-87 (Exhibit 32). Over one hundred contractors applying for SIG surety bonds were forced to agree to pay fees to CPC. *See* Client Listing of CPC (Exhibit 33). In most cases, the financial condition of these contractors prevented them from obtaining bonds elsewhere. Deposition of Day at 83, 120-21 (Exhibit 23).

One example of this illegal conduct involved JJW Construction, Inc. ("JJW"). JJW, an applicant for surety insurance at SIG's insurance subsidiary, was extorted to pay a $275,000 fee to CPC in exchange for the posting of a $500,000 letter of credit from Bellezza. *See* Deposition of Westling at 58-59 (Exhibit 15); Deposition of Broder at 42-45, 75-76; Deposition of L. Burton 126-30 (Exhibit 34); Deposition of M. Burton at 84-86, 336 and 343 (Exhibit 25); June 2, 1987 Agreement (Exhibit 35).

To prevent their illegal operation of SIG from being exposed, the defendants conspired to fraudulently conceal CPC operations from Beck. *See* Deposition of Westling at 12-17; Deposition of Kryszak at 57-58; Deposition

of M. Burton at 56-57. Thus, as a result of the fraudulent misrepresentation by the New Jersey Group and others, Beck was unaware of the following material facts when he executed the First Fidelity guaranty:

> 1. Contractors were being extorted to execute agreements with CPC as a condition to obtain bonds.
>
> 2. JJW had agreed to pay a $275,000 fee, in addition to the bond premium, to obtain bonds.
>
> 3. CPC was charging fees in excess of the premiums allowed under Florida law.

Affidavit of Beck at ¶4. Had Beck known of these facts, he would not have guaranteed the First Fidelity loan to SIG. *Id.;* January 5, 1995 Deposition of Beck at 273-74 (Exhibit 10).

3. The fraudulent misrepresentation of Beck's employment status.

In order to induce Beck to execute the guaranty, the New Jersey Group fraudulently concealed from Beck their plans to terminate him from his position as president of SIG. At that time, the New Jersey Group had already conspired to remove Beck's responsibilities and duties, and to eventually remove Beck from office, all in order to facilitate their illegal conduct.

In early December of 1987, some of the defendants, including Bellezza, met and discussed Beck's termination. Affidavit of R. Prupis at 9. These plans to terminate Beck were known by all of the SIG Board of Directors, other than Beck. *Id.;* Affidavit of Beck at ¶5. In fact, at this time,

the plans to terminate Beck were known throughout SIG. Deposition of Price at 26-30, 104-06 (Exhibit 36). However, by eliminating Beck from the "information loop," the New Jersey Group was able to hide this information from Beck. Beck had no idea of the conspiracy to terminate him until after his termination, which occurred 5 months after his execution of the guaranty. Affidavit of Prupis at 9; Affidavit of Beck at ¶5.

Thus, as result of the fraudulent misrepresentations and concealment by the New Jersey Group and others, Beck was unaware of the material fact that the defendants had plans to terminate him. Beck Affidavit at ¶7. Had Beck known of the plans to terminate him, he would not have executed the guaranty. *Id.*

C. The Defendants' Fraudulently Causing Beck To Fail To Sell His Stock.

The New Jersey Group and others made fraudulent misrepresentations to Beck that caused him to not sell his holdings of stock until it was too late. In fact, as early as the spring of 1987, Beck considered selling this stock. January 5, 1995 Deposition of Beck at 273-75. However, because of the fraudulent financial statements, the fraudulent concealment of the illegal manner in which the New Jersey Group were operating SIG and the fraudulent misrepresentations about the plans to terminate Beck, Beck did not sell the stock.[8] Had Beck known these things, he

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[8] All of this fraudulent conduct is detailed in Section I(B), *supra*.

would have sold the stock. *See* February 7, 1995 Deposition of Beck at 53-58; January 5, 1995 Deposition of Beck at 273-74.

D. The Defendants' Fraudulent Creation Of Causes For Beck's Termination.

The defendants purposely kept Beck out of the information loop at SIG. *See, e.g.*, Deposition of Price at 26-36, 39, 104-06 and 129-30 (Exhibit 36); Deposition of Bailey at 32-35 (Exhibit 16); Deposition of Mezey at 24, 36-37 (Exhibit 37); Deposition of Kane at 7-10 (Exhibit 38). In fact, SIG employees were specifically instructed to withhold essential information from Beck. *Id.;* Deposition of Sendaydiego at 23-25 (Exhibit 39).

Nevertheless, in the Spring of 1988, Beck began to discover some of the illegal conduct. He prevented the theft of over $2 million from SIG's subsidiary.[9] Deposition of Day at 66 (Exhibit 40); February 6, 1995 Deposition of Beck at 172-73. In addition, Beck contacted SIG's regulators and advised them that he had come to believe that the company's financial statements may have been overstated. Deposition of Hartsfield at 6-7, 19 (Exhibit 41); January 6, 1995 Deposition of Beck at 154-58 (Exhibit 12).

Seeing Beck as a threat to their continued criminal conduct, the New Jersey Group embarked on a scheme to fraudulently create causes to terminate Beck. *See* Deposition of Price at 26-36, 39, 104-06 and 129-30; Deposition of

[9] As more fully detailed in Section II(B), *infra*, after Beck's termination, the New Jersey Group proceeded to commit this theft.

Sendaydiego at 23-25, 42-46; Deposition of Weaver at 15-16, 71-73 (Exhibit 42); Deposition of Petigrow at 80-85 (Exhibit 43); February 6, 1995 Deposition of Beck at 171-73 (Exhibit 12). Through a series of secret meetings that Beck was excluded from in violation of Florida law, the New Jersey Group and the other defendants hatched their conspiracy with Firemark.[10]

Evidence of Firemark's falsification of grounds to terminate Beck and its involvement in the conspiracy have been discovered. In a recent deposition, a former Firemark employee testified that Firemark's chairman, M. Morrissey, confessed that Firemark fabricated things about Beck and recommended his termination because J. Morrissey wanted Beck's job. Deposition of Smith at 17-18 (Exhibit 44). This former Firemark employee also testified that Firemark fabricated documents to substantiate its recommendation to terminate Beck. *Id., see also* Deposition of Piraneo at 42-43 (same) (Exhibit 47). As

[10] The failure to give proper notice of a meeting of the board of directors renders that meeting illegal, and the actions taken at the meeting null and void. Fla. Stat. §607.0822, SIG's By-Laws at §2.6 (Exhibit 45). *Shelvin v. Nat'l Conservation Corp.*, 605 N.Y.S.2d 593 (App.Div. 1993); *Valerino v. Little*, 490 A.2d 756 (Md.App. 1985); *State v. D.A. Davidson & Co.*, 517 P.2d 722 (Mont. 1973).

The defendants attended at least two such secret meetings on April 21, 1988 and May 12, 1988, from which Beck was purposefully and illegally excluded. Deposition of Sparber at 13 (Exhibit 46). It was during the May 12, 1988 meeting that the defendants decided to oust Beck. *Id.* Furthermore, the minutes of the April 21, 1988 and May 13, 1988 "board meetings" do not exist, despite statutory mandates to maintain these records. *See* Fla.Stat. §607.1601(1).

part of Firemark's reward for its participation, the defendants gave J. Morrissey Beck's job. *See* Deposition of Bailey at 80-81 (Exhibit 16); Deposition of M. Morrissey at 372-73 (Exhibit 48).

II. EVIDENCE OF PREDICATE ACTS AGAINST OTHER VICTIMS

Noticeably lacking from the New Jersey Group's Motion for Summary Judgment is any argument against the substantial evidence of the predicate acts committed by the defendants against other victims, all of which form the *pattern* of racketeering conduct. Some of this substantial evidence was submitted to a New Jersey Court regarding the defendants' illegal scheme, as a defense to an action by the New Jersey Group against Beck and others. After reviewing this evidence, the New Jersey judge ruled:

> Defendant Beck has produced extensive documentation in which he asserts that his guarantee to Fidelity was induced by the fraud of Group [defendants Bellezza, Olstein and Paulus]; that he was induced to assume the position of President of SIG by misrepresentations by Group as to the assets of SIG; that Group and other defendants improperly mulcted the assets of SIG, causing it to become insolvent; that Bellezza and Paulus used corporations known as Chief Structures, Inc. and Construction Performance Corporation as instrumentalities to profit in violation of Florida law. Alleged also are other claims of fraud and illegality which need not be specified.

> Suffice it, that Beck's position is supported by evidence which raises issues of fact.

June 24, 1991 opinion at 2-3, *First Fidelity Bank v. SIG, et al.*, (Exhibit 49).

The following is a brief, additional synopsis of *some* of these predicate acts. Again, these predicate acts, while in some ways relate to the damages suffered by Beck, are pled and will be proved solely to satisfy RICO's pattern requirement.

A. ***Extortion of Contractors*** – Through the criminal conduct of the New Jersey Group and others, hundreds of contractors were extorted. Each such act of extortion constitutes at least one RICO predicate act. Some examples of this extortion are contained in Section I(C)(2), *supra*. *See also* Deposition of Westling at 34-35, 58-61, 180, 194, 202-05 (Exhibit 15); Deposition of L. Burton at 127-28 (Exhibit 17); Deposition of M. Burton at 100-01, 336, 344 (Exhibit 25); Deposition of Day at 103 (Exhibit 23) (CPC was set up to extort money from contractors).

B. ***Looting*** – The looting of SIG is described at length in Beck's Verified Crossclaim at ¶¶20-22. Some examples include the following acts of theft that took place after Beck's termination:

> 1. $2.5 million of policy holder surplus was stolen from SIG's subsidiaries and transferred to Bellezza, Olstein and others. Expert Report of Robert Shapiro at 5-7 (Exhibit 50) (and cites therein); Expert Report of Wayne Kauth at 9-12 (Exhibit 51) (and cites therein); Deposition of Day at 66-68 (Exhibit 40).

2. $4 million of policy holder surplus was stolen from SIG's subsidiaries and transferred to First Fidelity Bank. Expert Report of Shapiro at 6-7 (and cites therein); Expert Report of Kauth at 3, 11-12 (and cites therein).

3. Substantial funds were taken from one of SIG's subsidiaries by the back-dating of a reinsurance pooling agreement. Expert Report of Shapiro at 5 (and cites therein); Expert Report of Kauth at 7-8 (and cites therein).

4. $3.6 million of surplus interest was paid to SIG and used primarily to fund debentureholder payments (the vast majority of which were associated with the defendants), while this money should have been paid to other parties. Expert Report of Kauth at 8 (and cites therein); Deposition of Day at 27, 64 (Exhibit 52).

See generally December 14, 1994 Deposition of Beck at 161-68 (Exhibit 53). While the New Jersey Group attempts to minimize the illegality of these acts, there can be no doubt of their criminal nature. *See* Expert Report of Wayne Kauth (Exhibit 51); Complaints of FL-DOI (Exhibits 4, 5 and 6).

C. ***Fraudulent Financial Statements*** – The fraudulent financial statements created by the New Jersey Group and others were not only used to victimize Beck, but were also mailed to regulators, shareholders and creditors – each time, constituting a RICO predicate act. *See* December 14, 1994 Deposition of Beck at 182-83; Deposition of Petigrow at 25-26, 153-157 and 182 (Exhibit 43). The manner in which the New Jersey Group and others falsified the financial statements is set forth in

detail in Section I(C)(2). In addition, after Beck's termination, the New Jersey Group and others further falsified the financial statements of SIG. Expert Report of Shapiro at 6-7 (and cites therein); Expert Report of Kauth at 10-12 (and cites therein).

D. ***Fraudulent Promises To Indemnify*** – Examples of the fraudulent representations by members of the New Jersey Group to indemnify SIG's insurance company subsidiaries to allow bonds to be written to contractors in which the New Jersey Group had some interest is detailed in Section I(B), *supra*. A further example of this fraudulent conduct relates to Aldrich Construction. *See* Affidavit of L. Burton at 2 (Exhibit 54); Affidavit of R. Prupis at 2-3; Deposition of L. Burton at 98-115 (Exhibit 34).

Respectfully submitted,

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Jay Starkman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail this 20th day of April, 1995, to all counsel on the attached service list.

/s/ Jay Starkman
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 91-8121-CIV-ROETTGER

ROBERT A. BECK, II

Plaintiff,

vs.

RONALD M. PRUPIS, et al.,

Defendants.
_____/

PLAINTIFF, ROBERT A. BECK, II'S, MEMORANDUM OF LAW IN OPPOSITION TO THE NEW JERSEY GROUP'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff, Robert A. Beck, II ("Beck"), files this Memorandum of Law in Opposition to the New Jersey Group's[1] Motion for Summary Judgment.

[1] The New Jersey Group refers to defendants Leonard Bellezza, William Paulus, Jr., Ernest Sabato and Harry Olstein.

SUMMARY OF ARGUMENT

In its Motion for Summary Judgment, the New Jersey Group does nothing but repeat the standing arguments that were raised in its unsuccessful Motion to Dismiss. Once again, its arguments ignore the applicable law, which remains unchanged since that time. Furthermore, by selectively citing evidence, the New Jersey Group ignores the substantial evidence of the predicate acts committed directly against Beck – the acts by which Beck has suffered extensive damages and for which he has brought this RICO action. In fact, the damages that Beck suffered by reason of these predicate acts are classic RICO damages for which he has standing. The New Jersey Group simply cannot meet its heavy burden of establishing the complete absence of any genuine issues of fact. Accordingly, its Motion for Summary Judgment, and its concurrent attempt to escape accountability for an enormous criminal venture, must be denied.

ARGUMENT

I. STANDARD OF REVIEW FOR MOTION FOR SUMMARY JUDGMENT

Summary judgment is a drastic remedy and must be approached cautiously. *Transource International, Inc. v. Trinity Industries, Inc.*, 725 F.2d 274, 279 (5th Cir. 1984). Summary judgment is improper unless the underlying facts are undisputed, and the record is completely devoid of evidence from which reasonable persons might draw conflicting inferences about the facts. *Hall v. Diamond M Co.*, 732 F.2d 1246, 1248 (5th Cir. 1984). There must be *no*

genuine issue as to *any* material fact. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 467 (1961).

The burden of establishing the absence of a genuine issue of fact is on the movant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The court must view the evidence in a light most favorable to the non-moving party and indulge every reasonable inference from the facts in his favor. *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir. 1987). Before summary judgment is granted, "the facts and inferences [must] point so strongly and overwhelmingly in favor of one party, that the Court believes that reasonable men could not arrive at a contrary verdict. . . . " *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). "A litigant has the right to a trial where there is the slightest doubt as to the facts." *Peckham v. Ronrico Corp.*, 171 F.2d 653, 657 (1st Cir. 1948).

II. BECK HAS STANDING TO ASSERT HIS RICO CLAIMS.

Under 18 U.S.C. §1964(c), a plaintiff can sue for a violation of RICO if "he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Thus, in order to have standing under RICO, a plaintiff must show: a violation of section 1962, an injury to business or property and that the violation caused the injury. *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir. 1994).

The causation element of RICO's standing criteria requires RICO plaintiffs to prove proximate causation before they are permitted to recover. *Holmes v. Securities*

Investor Protection Corp., 112 S.Ct. 1311, 1317-1318 (1992). This requirement entails applying "[c]ausation principles generally applicable to tort liability" to RICO cases. *Cox*, 17 F.3d at 1399. A proximate cause, however, is not the same thing as a sole cause. *Id.* The test for proximate causation is whether the defendant's actions are "a substantial factor in the sequence of responsible causation," and whether "the injury is reasonably foreseeable or anticipated as a natural consequence." *Id.; Standardbred Owners Ass'n v. Roosevelt Raceway*, 985 F.2d 102, 104 (2d Cir. 1993).

A. Beck Has Standing To Assert His RICO Claim For The New Jersey Group's Fraudulent Inducement To Extend A $150,000 Loan To SIG.

Beck's damages relating to the $150,000 fraudulently induced loan were proximately caused by the New Jersey Group's RICO violations. These claims are based upon the predicate acts of mail and wire fraud.[2] Beck has introduced substantial evidence from which a jury could find that the New Jersey Group is responsible for committing these predicate acts.

Mail or wire fraud occurs when a person intentionally participates in a scheme to defraud another of money or property, and uses (or knowingly causes another to use) the mails or wires in furtherance of that

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[2] In the Verified Complaint, Beck details over 40 specific instances of the defendants' use of the mail and wires, many of which are set forth in Beck's Response to the New Jersey Group's Statement of Facts ("Beck's Statement of Material Facts"). *See also* Beck's RICO Case Statement (Exhibit 2).

scheme. *Pelletier v. Zweifel*, 921 F.2d 1465, 1498 (11th Cir. 1991).[3] One "knowingly causes" another to use the mails or wires "[w]here one does an act with knowledge that [their] use will normally follow in the ordinary course of business, or where such can reasonably be foreseen, even though not actually intended. . . . " *Pereira v. United States*, 347 U.S. 1, 8-9, (1954) (citations omitted). Thus, knowing participants in a scheme to defraud are legally liable for their co-schemers' use of the mails or wires in furtherance of that scheme. *U.S. v. Lothian*, 976 F.2d 1257, 1263 (9th Cir. 1992); *see also R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1354 (5th Cir. 1984).

For a plaintiff to recover under RICO for mail or wire fraud damages, he must show that he was a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme. *Pelletier*, 921 F.2d at 1499. The substantial evidence presented by Beck, at minimum, raises a jury question on this issue. To further the New Jersey Group's fraudulent scheme, they made fraudulent representations to Beck, orally and in writing, that Beck would continue to be Chief Executive Officer of SIG. Statement of Material Facts at 5-8. In addition, the Defendants fraudulently

[3] It is not necessary that the scheme contemplate the use of the mails as an essential element. *United States v. Maze*, 414 U.S. 395, 400 (1974); *U.S. v. Hollis*, 971 F.2d 1441, 1448 (10th Cir. 1992). It is sufficient that the mailing caused is a "part of the execution of the fraud," *Kann v. United States*, 323 U.S. 88, 95, (1944), or is "incident to an essential part of the scheme," *Pereira*, 347 U.S. at 8, 74 S.Ct. at 362, or is "a step in the plot." *Hollis*, 971 U.S. at 1448 (citation omitted).

concealed their illegal conduct from Beck.[4] *Id.* As a result of these fraudulent misrepresentations, Beck was induced into making the unsecured $150,000 loan. *Id.*

Contrary to the New Jersey Group's contention, this RICO injury suffered by Beck is not derivative, but is sufficient to establish standing. *See Pelletier v. Zweifel*, 921 F.2d at 1465; *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987) (complaint alleging fraudulent inducement to make capital contributions and a personal guaranty could state a RICO claim); *GICC Capital Corp. v. Technology Finance Group*, 30 F.3d 289 (2nd Cir. 1994) (creditor has individual standing as long as his injuries meet proximate cause test); *Ashland Oil, Inc. v. Arnet*, 875 F.2d 1271 (7th Cir. 1989) (plaintiff who reasonably relies on defendant's fraudulent financial statements and other misrepresentations has civil RICO standing); *Morley v. Cohen*, 888 F.2d 1006 (4th Cir. 1989) (plaintiff who is fraudulently induced into investing in defendant's scheme has RICO standing); *In re Colonial Ltd. Partnership Litigation*, 854 F.Supp. 64, 104-05 (D.Conn. 1994) (allegations that defendant's fraudulent conduct induced plaintiffs to purchase their limited partnership interest, and that this result was reasonably foreseeable to defendants were sufficient for proximate cause and standing; plaintiffs' claims were not derivative, as plaintiffs did not merely claim that they suffered diminution in the value of their investments); *Haggiag v. Brown*, 728 F.Supp. 286, 295

[4] Nondisclosure of a material fact with intent to create a false or fraudulent misrepresentation constitutes mail and wire fraud. *Pelletier*, 921 F.2d at 1508.

(S.D.N.Y. 1990) (allegation that plaintiffs were fraudulently induced into loaning money to defendant states viable RICO claim).

Instead of refuting the validity of Beck's claim that he was induced into extending the loan by the New Jersey Group's fraud, the New Jersey Group attempts to sidestep the evidence by arguing that Beck's claim is time-barred. *See* New Jersey Group's Memorandum of Law at 7-8. This argument, however, is misplaced. Beck is not attempting to raise a "new claim" for securities fraud based on the private placement. Rather, Beck's claim is based upon the fact that he was induced to extend the loan by the New Jersey Group's fraudulent conduct.

In fact, this claim is not new at all, as Beck's Complaint contains these allegations. *See* Complaint at ¶¶20-21. The New Jersey Group's argument amounts to a Rule 9(b) specificity claim. However, "[t]he specificity requirements of [Rule] 9(b) have been imposed to ensure that a defendant is apprised of the fraud claimed in a manner sufficient to permit the framing of an adequate responsive pleading. A party who fails to raise a 9(b) objection normally waives the requirement." *United National Records, Inc. v. MCA, Inc.*, 609 F.Supp. 33, 39 (N.D. Ill. 1984); 5A C. Wright & A. Miller, *Federal Practice and Procedure*, §1394 at 778 (2d ed. 1990) (and cases cited therein); *see also Todaro v. Orbit Int'l Travel*, 755 F.Supp. 1229, 1233 (RICO defendants who answered complaint and failed to raise 9(b) objection to complaint's mail and wire fraud allegations waived objection). The New Jersey Group, having failed to raise this objection in its Answer, has waived its ability to now raise it. *See* New Jersey Group's Answer and Affirmative Defenses (Exhibit 55).

B. Beck Has Standing to Assert His Claim That He Was Fraudulently Induced Into Guarantying The $7.5 Million First Fidelity Loan.

Beck has presented substantial evidence that, pursuant to a scheme to defraud Beck and others – a scheme furthered by the New Jersey Group's use of the mails and wires – Beck was fraudulently induced to personally guaranty a $7.5 million loan from First Fidelity Bank to SIG, by which he has been directly injured. *See* Beck's Statement of Material Facts at 8-15. The Eleventh Circuit specifically has held that these allegations state harm suffered by an individual *directly*, not derivatively.[5] *Warner*, 828 F.2d at 1531.

The specific damages sought by Beck in relation to this claim are the attorneys' fees he incurred in defending the First Fidelity suit. While the Eleventh Circuit has yet to decide the issue, the weight of decisional precedent holds that attorneys' fees (or other expenses) incurred as a result of Defendants' RICO violations are recoverable in a RICO suit.[6] *See Stochastic Decisions Inc. v. Didomenico,*

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[5] In light of the Eleventh Circuit's unequivocal statement of the law on this issue, any citation by the New Jersey Group to contrary law from other jurisdictions is misplaced.

[6] The New Jersey Group's reliance on *Local 355 v. Pier 66 Co.*, 599 F.Supp. 761, 765 (S.D. Fla. 1984), for the proposition that attorneys' fees *cannot* be an element of RICO damages, is misplaced. An exhaustive search has failed to locate even a single Circuit that echoes such a view. Also, nothing in the language of the RICO statute itself supports this additional standing hurdle. The decision in *Local 355* seems to be based upon the fact that the claims raised by the plaintiff were completely preempted by the National Labor Relations Act. *See*

995 F.2d 1158, 1167 (2nd Cir. 1993) (legal fees may constitute RICO damages if proximately caused by a RICO violation); *Malley-Duff & Associates v. Crown Life Ins. Co.*, 792 F.2d 341, 355 (3d Cir. 1986) (litigation expenses caused by predicate acts recoverable under RICO); *Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496 (9th Cir. 1985) (same); *Alexander Grant & Co. v. Tiffany Industries*, 742 F.2d 408, 411 (8th Cir. 1984) (standing to sue under RICO for attorneys' fees incurred as a result of S.E.C. investigation); *Miller Hydro Group v. Popvitch*, 851 F.Supp. 7, 13 (D. Me. 1994) (litigation fees caused by defendants' RICO violations are recoverable), *vacated, but then readopted in*, 770 F.2d 717 (8th Cir. 1985).

The attorneys' fees incurred by Beck in defending the First Fidelity suit represent a proximately caused injury, the redress of which Beck has standing to pursue. Beck was fraudulently induced by the defendants to personally guaranty the loan, as a result of a fraudulent scheme fueled by the predicate acts of mail and wire fraud. As part of this scheme, the New Jersey Group, together with others, falsified SIG records and financial statements, resulting in a material overstatement of SIG's value. *See* Beck's Statement of Material Facts at 9-13. As the New Jersey Group intended, Beck relied upon these fraudulently created financial statements and estimates in his assessment of the likelihood that SIG would be able to repay the First Fidelity loan. *Id.* As part of their scheme,

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Id. at 763-64. The Court's two paragraph discussion of the attorneys' fees' claims and RICO standing is an afterthought, and, in light of the weight of authority to the contrary, should be ignored.

the New Jersey Group also conspired to fraudulently conceal their illegal conduct. *Id.* at 13-14. Had Beck known of this conduct, he would not have guaranteed the loan. *Id.* In order to further induce Beck to execute the personal guaranty, the New Jersey Group fraudulently concealed from Beck its plan to terminate him. *Id.* at 15. Had Beck known of the plan to terminate him, he would not have executed the guaranty. *Id.*

When SIG finally collapsed under the weight of the Defendants' racketeering, the First Fidelity loan went into default and Beck was sued on the guaranty. The Defendants, actions were "a substantial factor in the sequence of responsible causation," and the litigation fees incurred by Beck were "reasonably foreseeable or anticipated as a natural consequence." *Cox*, 17 F.3d at 1399; *Standardbred Owners Ass'n v. Roosevelt Raceway*, 985 F.2d 102, 104 (2d Cir. 1993).

Beck's resulting damages can hardly be classified as "incidental." RICO plaintiffs, like tort plaintiffs in general, have a duty to mitigate their damages. *Bieter Company v. Blomquist*, 987 F.2d 1319, 1329 (8th Cir. 1993); *Boards of Managers of Dunbar Lakes Condominium v. Dunbar Homes Inc.*, 1991 WL 18194 (N.D. Ill.). Had Beck not defended the First Fidelity action and pursued the legal malpractice claim, Beck's damages flowing from the guaranty would have been substantially higher.[7] Beck's attorneys' fees, therefore, represent the costs to Beck of successfully mitigating the guaranty damages, as he is

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[7] The contribution claim against Beck was for over $3.5 million.

required to do. It makes no sense that now, having successfully fulfilled his duty to mitigate damages on a claim for which RICO provides standing, Beck would lose that standing because his mitigation efforts were so successful that the only damages that remain are the costs of the mitigation itself.[8]

C. Beck Has Standing To Assert His Claim That He Was Unlawfully Terminated Pursuant To The New Jersey Group's RICO Conspiracy.[9]

1. The Eleventh Circuit has yet to determine whether a whistleblower has standing to assert a RICO conspiracy claim under §1962(d).

The New Jersey Group incorrectly argues that *O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989), *cert. den.*, 496 U.S. 926 (1990), stands for the proposition that a whistleblower does not have standing to assert a RICO conspiracy claim. In *O'Malley*, a motion was filed seeking

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[8] Beck's recovery of $425,000 from the Lampf, Lipkind settlement has not made him whole for the damages suffered by him due to the First Fidelity guaranty. Beck's total attorneys' fees in defending that case exceed $800,000. Beck is clearly not attempting to recover more than once. Also, the entire $425,000 did not go towards reimbursing Beck for his attorneys' fees in the First Fidelity matter. The sum needs to be allocated between the number of cases that it settled. This issue is simply inappropriate for summary judgment.

[9] In a brazen attempt to have another bite at the apple, the New Jersey Group raises the identical argument already rejected by this Court when it denied the New Jersey Group's Motion to Dismiss. *See* Beck's Statement of Facts at 5.

dismissal of a complaint containing two separate civil RICO counts: Count I of the complaint alleged a substantive violation under 18 U.S.C. §1962(c); Count II alleged a RICO conspiracy in violation of 18 U.S.C. §1962(d). *Id.* at 1559. Though *O'Malley* barred claims based on whistleblower allegations, its holding was expressly limited to the complaint's substantive RICO count. *Id.* at 1557. The court's discussion of the RICO conspiracy count was completely separate from its holding on the issue of standing, dismissing the RICO conspiracy count for a lack of specificity:

> Count II need not detain us long. The district court dismissed Count II – the RICO conspiracy count – because the allegations of a conspiracy were merely conclusory and unsupported by any factual allegations. We find that dismissal to be proper.

Id. at 1560 (citations omitted). Accordingly, *O'Malley* expressly left undecided the issue of whether a plaintiff had standing to raise a RICO conspiracy count based on whistleblower injury.[10]

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[10] The New Jersey Group's reliance on *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), and *Schenk v. Southeast Banking Corp.*, 725 F.Supp. 1231 (S.D. Fla. 1989), is similarly misplaced. In *Morast*, the complaint alleged that the plaintiff was discharged without justification and purely in retaliation for his reporting an irregular transaction and cooperating with the subsequent investigation. *Id.* at 929. *Morast*'s holding can hardly be characterized as a proscription of RICO conspiracy claims grounded on whistleblower injury, especially given the court's suggestion that its holding might have been different if the complaint had alleged termination as a result of a refusal to participate in the defendants' illegal scheme. In *Schenk*, it is not

This issue remains undecided in this Circuit as of the date of this Memorandum.

2. The Eleventh Circuit should echo the Circuits that have held that a whistleblower should have standing to assert a RICO conspiracy claim.

In its Motion for Summary Judgment, the New Jersey Group ignores the weight of authority from other jurisdictions which hold that a whistleblower has standing to assert a RICO conspiracy claim. *See, e.g., Shearin*, 885 F.2d 1162 (3d Cir. 1989); *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344 (7th Cir. 1992); *Callan v. State Chemical Manufacturing Co.*, 584 F.Supp. 619 (E.D. Pa. 1984). *See also Flinders v. Datasec Corp.*, 742 F.Supp. 929 (E.D. Va. 1990) (injury from overt act, not necessarily a predicate act of racketeering, is sufficient to confer standing if the overt act is wrongful). It is these cases that should guide this Court's ruling in the instant case.

The courts that have rejected whistleblower standing under §1962(d) have typically based their decision on the analysis that the whistleblower's injuries did not stem from a predicate act within the purview of §1961(1). *See, e.g., Bowman v. Western Auto Supply Co.*, 985 F.2d 383 (8th Cir. 1993). However, as pointed out by the Seventh Circuit, this analysis ignores the clear language of the statute:

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clear whether the plaintiff even raised a RICO conspiracy count in his complaint.

> [Section] 1964(c) allows suits by anyone "injured . . . by reason of a violation of §1962." Section 1962(d) prohibits conspiracies, so a person harmed by the conspiracy has been injured "by reason of" a RICO violation. Congress could have written RICO to state that only those injured by reason of predicate acts committed as part of a RICO violation could sue. It did not, and for courts to read §1964(c) as if that is what Congress wrote would be "tantamount to rewriting the statute."

Schiffels, 978 F.2d at 349-50. It is axiomatic that the plain words of a statute are controlling as to the statute's meaning and effect. *See, e.g., Sedima*, 473 U.S. at 495 n.13. The Supreme Court has already applied this maxim to the RICO statute. *Id.* ("There is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement.").

Accepting the New Jersey Group's distorted interpretation of RICO would "assure employers that when troublesome employees threaten to disclose the commission of RICO violations, those employees can be threatened with termination to keep such violations hidden from public view . . . , ensur[ing] that fewer instances of fraud will be uncovered and that Congress's intent in enacting the RICO statute will be frustrated." *Bowman*, 985 F.2d at 389 (Heany, J., dissenting). Surely, there is no appropriate rationale for writing into the RICO statute a requirement that Congress expressly chose not to include.

Rejection of the predicate act injury requirement is also warranted by traditional concepts of conspiracy law. A conspiracy to violate RICO does not "require anything beyond that required for a conspiracy to violate any other

crimes." *United States v. Weissman*, 899 F.2d 1111 (11th Cir. 1990) (citation omitted); *United States v. Napolitan*, 791 F.2d 489 (7th Cir. 1986). The conduct targeted by §1962(d), like that of all laws prohibiting conspiracies, is the *agreement* to violate the substantive provisions of RICO, not the actual substantive violations, themselves. *United States v. Angiulo*, 847 F.2d 956, 964 (1st Cir. 1988); *Shearin*, 885 F.2d at 1169; *United States v. Phillips*, 665 F.2d 971, 1038 (5th Cir.), *cert. denied*, 457 U.S. 1136 and 459 U.S. 906 (1982); *United States v. Glecier*, 923 F.2d 496, 500 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 54 (1991); *United States v. Brooklier*, 685 F.2d 1208, 1222 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983). Thus, while §1962(d) requires an agreement to commit predicate acts, it does not require that any predicate acts actually be committed. *Shearin*, 885 F.2d at 1169; *Phillips*, 664 F.2d at 1038.

> [S]ince RICO conspiracy does not require the actual commission of a predicate act, it follows that the act causing plaintiff's injury need not be a predicate act of racketeering. A person directly injured by an overt act in furtherance of a RICO conspiracy has been injured "by reason of" the conspiracy. Since a conspiracy to violate RICO's substantive provisions is itself a violation of RICO, *see* 18 U.S.C. §1962(d), a person injured "by reason of" the conspiracy has been injured "by reason of" the RICO violation. That is all that §1964(c) requires for standing to bring a civil RICO action.

Schiffels, 978 F.2d at 348-49.

Last, rejection of the New Jersey Group's argument is also in accord with the Supreme Court's mandate that

"RICO is to be read broadly," with a view toward "activity which RICO was designed to deter," and to be "liberally construed to effectuate its remedial purposes." *Sedima*, 473 U.S. at 497-500. Given this edict, "it would be anomalous to allow plaintiffs to recover for harm suffered from investment in, or control or conduct of, a pattern of racketeering, yet preclude recovery for conspiracy to commit these violations simply because the overt act that furthers the conspiracy does not itself qualify as racketeering." *Shearin*, 885 F.2d at 1170.

D. Beck Has Standing To Assert His RICO Claim For The New Jersey Group's Fraudulent Inducement To Purchase $75,000 In SIG Stock.

The $150,000 debenture Beck purchased from SIG was sold to him in a "unit" that included $75,000 in SIG stocks. *See* Statement of Material Facts at 7. The same fraudulent misrepresentations and omissions regarding Beck's position as SIG's Chief Executive Officer, the New Jersey Group's illegal practices and their fraudulent promises to indemnify contractors are thus at issue. *See* Section II(A), *supra*. Beck relied on these in making the purchase, which he would not have otherwise made. This injury is not derivative, and is sufficient to establish standing. *See Pelletier v. Zweifel*, 921 F.2d at 1506 (plaintiff's allegations that he relied on defendant's promise to transfer certain managerial controls to plaintiff, that defendant would not have purchased certain stock without such guarantees and that he would not have purchased stock had knowledge of misappropriation of the company's funds not been fraudulently kept from him, satisfy section 1964(c)'s proximate cause requirement).

E. Beck Has Standing To Assert His RICO Claim For The New Jersey Group's Fraudulent Inducement Not To Sell His SIG Stock.

In addition to the above-described $75,000 in SIG stocks, Beck owned substantial additional stock in the New Jersey Group's Enterprise. Beck's standing to bring a claim for the loss of this additional stock flows from the fact that Beck seeks redress of harms visited upon him directly, not the general diminution of stock value suffered indirectly by the majority of the other stockholders. *See generally, Pelletier,* 921 F.2d at 1506. The New Jersey Group, pursuant to their fraudulent scheme furthered by mail and wire fraud, directly and fraudulently induced Beck not to sell his stock until it had significantly lost its value. In fact, in early spring of 1987, Beck considered selling his stock. *See* Statement of Material Facts at 15-16. However, because of the fraudulent financial statements, the fraudulent concealment of the illegal manner in which the New Jersey Group were operating SIG and the fraudulent misrepresentations about the plans to terminate Beck, Beck did not sell this stock. *Id.*

III. BECK'S CLAIMS ARE NOT BARRED BY RES JUDICATA OR COLLATERAL ESTOPPEL.[11]

In its Motion for Summary Judgment, the New Jersey Group argues that Beck's RICO claims are barred by the

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[11] Again seeking another bite at the apple, the New Jersey Group argues that Beck's claims are barred by res judicata – an argument already rejected by this Court when it denied the New Jersey Group's Motion to Dismiss. *See* Statement of Material Facts at 5.

doctrine of res judicata, based upon the Florida Circuit Court's dismissal of some of Beck's prior RICO counts. The New Jersey Group, however, conveniently ignores the fact that Beck's current RICO claims seek damages based upon entirely new predicate acts that were not, and could not have been, alleged in the Florida Circuit Court action.

Several identities must coalesce before a matter is made res judicata: 1) identity of parties; 2) identity of cause of action; 3) identity of thing sued for; 4) and identity of quality in party for or against whom suit is made. *Albrecht v. State,* 444 So.2d 8, 11-12 (Fla. 1984). Where a second suit is between the same parties, but based on a different cause of action from the first suit, the prior judgment will not have res judicata effect. *Id.* The determining factor in deciding whether two claims are part of the same cause of action is whether the facts or evidence necessary to maintain suit are the same in both actions. *Id.*

An identity of causes of action is not present in this case. The RICO counts contained in the first suit filed in Florida Circuit Court were based entirely on Beck's termination, and no allegations were raised dealing with the fraudulently induced personal guaranty or unsecured loan.[12] *See* Beck's Statement of Material Facts at 3-5. The

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[12] In its Motion to Dismiss at 12, the New Jersey Group contends that the Florida Circuit Court action included an allegation that Beck was fraudulently induced to guaranty the First Fidelity loan in paragraph 32(a) of the Complaint. This is simply untrue. On the contrary, no such allegation is present anywhere in the Florida Circuit Court complaint. *See* Florida Circuit Court Complaint (Exhibit 3).

facts and evidence necessary to maintain suit for Beck's loan and guaranty damages are substantially different from the facts and evidence that would have been presented in the Florida Circuit Court action, which did not involve these claims. *Id.*

The substantive RICO counts in Beck's initial Complaint filed in Florida Circuit Court sought to recover damages that Beck sustained as a whistleblower. Beck's claims for these damages were specifically included in each of the Complaint's substantive RICO counts. Florida Circuit Court Complaint at ¶¶74-76, 79, 83 and 87 (Exhibit 3). Conversely, the instant Complaint does not include a claim for whistleblower damages in any of its substantive claims. Complaint at ¶¶129-135, 136-138 and 139-141. The only civil RICO claim for whistleblower damages is found in the Complaint's RICO conspiracy count, raised pursuant to §1962(d), which, as more fully detailed in note 14, *infra*, was never adjudicated.

The New Jersey Group also argues that res judicata should bar Beck's substantive claims because the predicate acts committed against other individuals is identical in both cases. Even where the second action includes the facts and evidence that were presented in the first action as a subcomponent of the total facts and evidence to be presented, however, res judicata does not apply if the essential "focus" of the second action is different from that of the previous action. *See Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1510 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986). In the instant case, the focus of the substantive claims is the damages Beck suffered by reason of being fraudulently induced to guaranty and extend loans. These claims were not (and could not have

been[13]) pled in the Florida Circuit Court action. The remaining predicate acts are pled solely to fulfill the pattern requirement. The new predicate acts constitute new and independent causes of action. *See Bivens Gardens Office Building v. Barnett Bank*, 906 F.2d 1546 (11th Cir. 1990) (separate injuries resulting from separate predicate acts constitute independent causes of action), *cert. denied*, 500 U.S. 910 (1991); *Spiegel v. Continental Illinois National Bank*, 790 F.2d 638 (7th Cir.) (res judicata did not bar subsequent RICO action, which involved same parties and allegations of first RICO action, in that second action involved two newly alleged mail fraud predicate acts which occurred after filing of first action), *cert. denied*, 479 U.S. 987 (1986).[14]

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[13] Beck could *not* have raised these claims in the Florida Circuit Court action. When that action was filed, Beck had not yet suffered damages from these predicate acts because SIG had not yet declared bankruptcy – Beck had not yet sustained any injury as a result of the fraudulently induced unsecured loan and personal guaranty. This did not occur until after the prior action was dismissed. *See Bivens*, 906 F.2d 1546; *Colonial Penn Ins. Co. v. Value Rent-a-Car*, 814 F.Supp. 1084 (S.D. Fla. 1992).

[14] The New Jersey Group does not argue that Beck's RICO conspiracy claim, which does seek damages suffered by Beck as a whistleblower, is barred by res judicata, nor could it, for that claim was voluntarily dismissed without prejudice by Beck in the Florida Circuit Court action. *See* Exhibit "C" to New Jersey Group's Motion to Dismiss. Under Florida law, a claim which is voluntarily dismissed does not support a defense of res judicata in a subsequent action because the voluntary dismissal does not constitute an adjudication on the merits. *New Port Largo, Inc. v. Monroe County*, 706 F.Supp. 1507 (S.D. Fla. 1988); *Wormser v. State*, 384 So.2d 310 (5th DCA 1980).

Furthermore, a final order is necessary for application of the doctrine of res judicata. *Thomson v. Petherbridge*, 472 So.2d 773, 774 (Fla. 1st DCA 1985). Where, as is the case here, certain factually interrelated counts of a plaintiff's complaint were dismissed with prejudice, and subsequently the plaintiff voluntarily dismissed the remaining count, the order of dismissal with prejudice is not a "final order," and does not bar refiling of any or *all* of the counts. *Hendrick v. CSX Transportation, Inc.*, 575 So.2d 709, 712-13 n.5 (Fla. 1st DCA 1991).

CONCLUSION

For the foregoing reasons, the New Jersey Group's Motion for Summary Judgment should be denied in its entirety.[15]

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[15] Even if the federal claims were to be dismissed, this Court should retain jurisdiction over Beck's pendent state law claims, especially given that, otherwise, those state law claims would be time-barred. *See, e.g., Garner v. Pearson*, 732 F.2d 850, 853 (11th Cir. 1984).

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I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail this 20th day of April, 1995, to all counsel on the attached service list.

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Due to their volume, the Exhibits to Plaintiff, Robert A. Beck, II's, Memorandum of Law in Opposition to the New Jersey Group's Motion for Summary Judgment, which are part of the record below (R 160-162), are not duplicated in this Joint Appendix

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-8121-CIV-ROETTGER

ROBERT A. BECK, II,

Plaintiff,

v.

ROBERT M. PRUPIS, et al.

Defendants.
_____/

REPLY MEMORANDUM OF LAW OF [sic] IN SUPPORT OF DEFENDANTS' THE BELLEZZA GROUP'S MOTION FOR SUMMARY JUDGMENT

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LEGAL ARGUMENT

BECK'S RICO CLAIMS ARE LEGALLY DEFICIENT BECAUSE HIS ALLEGED INJURIES DID NOT FLOW FROM COMMISSION OF ANY RICO PREDICATE ACTS

In his RICO Case Statement, Beck delineated 50 alleged RICO predicate acts falling into the following categories: (1) 36 acts of alleged extortion and mail/wire fraud committed against contractors seeking bonds, requiring them to pay fees to CPC that Beck contends should have been insurance premiums; (2) 6 acts of alleged "looting" of SIG's Insurance Subsidiaries, by causing them to transfer funds to the parent corporation (SIG) to pay legitimate corporate debts; (3) 3 acts of alleged mail/wire fraud committed against First Fidelity Bank, which loaned SIG $7.5 million in December 1987 in reliance on allegedly false financial information; and (4) 5 alleged acts which supposedly led to his termination in May 1988.

Faced with his own deposition testimony that these alleged predicate acts were not directed at him and did not cause him any direct harm and, accordingly, with overwhelming caselaw that deprives him of RICO standing, Beck now does a complete about-face and changes his theory of the case. This turnabout is made clear by Beck's own Statement of Material Facts, which expressly concedes: "Beck does *not* seek any damages resulting from *those* [50] predicate acts. They are plead [sic] in the instant case merely to satisfy RICO's pattern requirements." Beck Facts at 5. Instead, Beck now asserts a new RICO theory that he was "fraudulently induced" to purchase his stock/debenture Unit in August 1986 based on

an alleged promise that he would be SIG's CEO forever. Yet, as Beck concedes, none of the predicate acts pleaded in his RICO Case Statement allege any racketeering activity in connection with this alleged promise. As set forth below, as a matter of law, there cannot be a RICO violation based upon this allegation.

As a separate and distinct RICO claim, Beck also tries to salvage RICO standing by claiming that false financial projections (a prediction of SIG's ***future*** financial performance) were given ***to first Fidelity*** prior to it loaning SIG $7.5 million – a loan that Beck, together with nine other SIG directors, guaranteed. But Beck's deposition confirms he did not receive or rely on this projection before signing the guaranty.

Finally, Beck concedes that his RICO claim based upon his employment termination is barred by the Eleventh Circuit decisions in *O'Malley* and *Morast*. But to circumvent this undisputed, well-settled law, he recharacterizes his claim as one of "fraudulent termination," i.e. that defendants allegedly created false causes for his termination. There is no such thing as a cause of action for "fraudulent termination." Beck had an Employment Agreement with SIG that allowed termination "for cause." If "cause" did not exist, then Beck had a common law breach of contract claim against SIG and certainly not a treble damage RICO claim against these defendants who, as SIG's directors, voted for the termination. Indeed, the Florida state court previously denied Beck's claim against these defendants that they conspired to wrongfully terminate him.

A. Beck Cannot Recover For His August 1986 Stock/Debenture Purchase

1. Beck Did Not Rely on Any Material Misrepresentations

On August 11, 1986, Beck purchased a SIG investment Unit consisting of a $150,000 debenture and $75,000 common stock, for which he now seeks RICO damages. The purchase was part of a $33 million offering predicated upon a Private Placement Memorandum (PPM) that Beck himself played a substantial role in preparing. Beck now asserts that the PPM upon which he relied in purchasing his investment represented he would be CEO forever. But it says no such thing. At page 42, the PPM simply listed the *current* officers and directors of SIG and stated that Beck was "then" President and CEO. Beck Exh. 11. In no way did the PPM say that Beck would *continue* as CEO. Indeed it cold not, since Section 4.2 of SIG's Bylaws gave the Board complete discretion to remove any officer at any time. Therefore, there was no misrepresentations in the PPM upon which to base a RICO mail fraud claim. *See Arango v. Guzman Travel Advisors*, 761 F.2d 1527 (11th Cir. 1985) (no fraud where written document did not purport to promise anything to plaintiff); *Kramer v. Unitas*, 831 F.2d 994 (11th Cir. 1987).

What makes Beck's allegation even stranger is that in June 1986, two months *before* he purchased his Unit, he signed a five-year Employment Agreement with SIG that gave him the title of President but said nothing about him being CEO. Hartmann Reply Cert., Exh. A. Beck conceded that nothing in his Employment Agreement obligated SIG to keep him as CEO. *Id.*, Exh. B. Beck cannot

assert that promises were made to perpetually title him as CEO when such allegations directly contradict the express terms of his Employment Agreement. *See Longnecker v. Ore Sorters (North Amer.), Inc.*, 634 F. Supp. 1077 (N.D. Ga. 1986) (employee's fraud claim dismissed because representations conflicted with written employment contract); *Jankovich v. Bowen*, 844 F. Supp. 743 (S.D. Fla. 1994) (same); *Smith v. Mellon Bank*, 957 F.2d 856 (11th Cir. 1992); *Chris Berg, Inc. v. Acme Mining Co.*, 893 F.2d 1235 (11th Cir. 1990). Moreover, Beck's brief cites nothing in the record to prove oral representations by anyone to perpetually title him as CEO.

Moreover, Beck was represented by counsel who negotiated his employment contract. If the CEO title was so important, his counsel could easily have negotiated an appropriate provision, which was not done. Indeed, Beck testified that after learning he was no longer CEO, he consciously decided to remain with SIG, believing he "had a great opportunity" with a company he thought had a promising future. Reply Cert., Exh. B. Therefore, Beck cannot claim that remaining as CEO was important when, for almost two years after the title was removed, he did nothing to rescind his stock/debenture purchase, opting instead to remain as President and collect his $135,000 annual salary. *See Basic Inc. v. Levinson*, 488 U.S. 223, 108 S. Ct. 978 (1988).

2. There Were no RICO Predicate Acts Inducing Beck to Purchase His Unit

It is well-settled that RICO damages are not recoverable unless they flow directly from commission of

predicate acts of racketeering. *Sedima v. Imrex Co.*, 473 U.S. 479, 496-97, 105 S.Ct. 3275, 3285 (1985). Beck simply has not shown that defendants committed any RICO predicate acts with respect to his claim that he was to be CEO forever. Beck's brief alleges that, "both orally and in writing, *through the mails*, that he would continue to be Chief Executive Officer of SIG after the offering." Beck Statement of Material Facts at 7 (emphasis added). But missing from this assertion is any citation to the record (other than the previously discussed PPM), and we are left to guess what mailing he is referring to as the basis for the conjured claim. A RICO plaintiff simply cannot base a mail/wire fraud claim on unsupported assertions of counsel in a brief, especially since the record is devoid of any deceptive use of mails or wires regarding the CEO allegation. *See In re Cascade Intern. Sec. Lit.*, 840 F. Supp. 1558, 1582-83 (S.D. Fla. 1993).

In the absence of RICO predicate acts, Beck is left at best with a common law misrepresentation claim, which does not support a treble damage RICO claim. Such common law tort claims cannot be swept under the RICO umbrella since, in enacting RICO, Congress certainly did not intend to federalize state tort law by permitting RICO plaintiffs to recover treble damages for non-criminal fraudulent acts. *Willis v. Lipton*, 947 F.2d 998, 1001 (1st Cir. 1991); *Haroco v. American Nat. Bank and Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985); *Nodine v. Textron, Inc.*, 819 F.2d 347, 349 (1st Cir. 1987).

3. Beck's Injuries Were Not Caused By Defendants' Alleged Misrepresentations

The Supreme Court has held that for a plaintiff to have RICO standing, his damages must have been both actually and proximately caused by the predicate acts of racketeering. Thus a threshold requirement is that the defendants' acts be the actual or "but for" cause of plaintiff's damages. *Holmes v. Security Inv. Protection Corp.*, 112 S.Ct. 1311, 1317-18 (1992). It is obvious from Beck's pleadings and depositions that his injuries were not caused by the alleged promise to keep Beck as CEO forever. Beck has repeatedly stated that SIG's practices of "extorting contractors" and "looting" SIG's Subsidiaries led to SIG's demise and the loss of his investment unit. *See* Bellezza Group Statement of Material Facts at 9-14. Beck thus concedes, as he must, that the predicate acts pleaded in his RICO Case Statement, practiced *upon SIG and its Subsidiaries* – not the alleged promise he would forever be CEO – led to his investment loss.

Beck may have the temerity to claim he could have prevented SIG's demise had he remained CEO. Such a claim, however, is much too speculative to be given any credence under *Holmes*. Moreover, Beck was President and a SIG director through May 1988. He was in charge of SIG's financial affairs. As such, there was nothing to prevent him from stopping the alleged illegal practices he contends caused SIG's demise. Indeed, at page 16 of his brief, Beck boasts that as President, he prevented the alleged theft of $2 million, i.e., a transfer of funds from the subsidiary to SIG. Therefore, not having the CEO title did not prevent him from acting.

4. Beck Has Not Proven a Pattern of Racketeering Activity

Beck alleges that defendants, by (mis)representing to him his CEO status, conducted or conspired to conduct the affairs of SIG through a pattern of racketeering activity, in violation of Sections 1962(c) and (d). This claim clearly does not meet the 'pattern of racketeering" requirement of Section 1961(5). As Beck conceded, the predicate acts pleaded in his RICO Case Statement were directed against third parties and NOT against him. But Beck mistakenly believes that he can attach himself like a parasite to the RICO pattern pled against those third parties, by alleging injury from wholly *separate* acts of common law fraud. Beck, however, cannot establish a pattern of racketeering by latching onto predicate acts targeting and directly injuring third parties. *Vild v. Visconsi*, 956 F.2d 560, 567 (6th Cir. 1992). Rather, he himself must have been the target of the predicate acts of mail/wire fraud. *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991); *Kingston Square Tenants Ass'n v. Tuskegee Gardens*, 792 F. Supp. 1566, 1578 (S.D. Fla. 1992).

The question then becomes whether the *single act* of alleged misrepresentation regarding his CEO status meets the "pattern" requirement. It clearly does not.[1] 18 U.S.C. § 1961(5) defines pattern to include "at least two acts of racketeering activity." The Supreme Court interpreted

[1] Of course, since Beck has not even proven any predicate acts in connection with the private offering, it goes without saying that there is no pattern. But for purposes of this subsection only, it is assumed *arguendo* that there was a predicate act.

Section 1961(5) to require that the predicate acts must be both related and continuous. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237-38, 109 S. Ct. 2893, 2899-2900 (1989). To establish continuity, Beck must prove either a "closed-ended" pattern or an "open-ended" pattern. A closed-ended pattern is a series of related predicate acts extending over a "substantial period of time." Predicate acts occurring within a period of weeks or months will not suffice. An open-ended pattern is one that poses a threat of continued criminal activity of the same nature. *Id.* at 241-42.

Here, Beck's claim simply is that he was defrauded when purchasing his investment unit by the alleged false promise of being CEO perpetually. This does not satisfy the "pattern" requirement. This "close ended" alleged fraud occurred only once and in a short period of time, and therefore it cannot comprise a "pattern." *H.J., Inc.*, 492 U.S. at 241-42, 109 S.Ct. at 2902 (pattern not established by predicate acts lasting only a few weeks or months); *see Sheftelman v. Jones*, 636 F. Supp. 263, 268 (N.D. Ga. 1986); *Webb v. Primo's, Inc.*, 706 F. Supp. 863, 871 (N.D. Ga. 1988); *Hutchinson v. Wickes Companies, Inc.*, 726 F. Supp. 1315, 1320 (N.D. Ga. 1989); *Aldridge v. Lily-Tulip, Inc.*, 953 F.2d 587, 594 (11th Cir. 1992); *Downing v. Halliburton & Assocs.*, 812 F. Supp. 1175, 1182 (M.D. Ala. 1993); *In re Fairchild Industries ERISA Lit.*, 768 F. Supp. 1528, 1537 (N.D. Fla. 1990).

B. Beck Cannot Recover For the First Fidelity Guaranty

As a matter of law, Beck's RICO claim regarding the guaranty must fail, because on the facts of this case attorneys fees are not compensable RICO damages. Legal fees are not recoverable under RICO where they were incurred only incidentally or were too remote from the predicate acts. *See Miller Hydro Group v. Popovitch*, 851 F. Supp. 7, 13-14 n.6 (D. Me. 1994); *Lemelson v. Wang Labs.*, Inc., 874 F. Supp. 430, 433 (D. Mass. 1994).[2] Here, Beck's legal fees were not even caused by RICO predicate acts; they were caused by alleged common law fraud of allegedly inducing Beck to sign the Guaranty. Beck has not alleged or proven that he relied on any mailings in signing the guaranty.

In any event, the fees were expended only indirectly and only after several contingencies occurred: first, SIG defaulted on the corporate note; second, SIG declared bankruptcy, preventing First Fidelity from collecting against the direct obligor; then First Fidelity sued the guarantors, and then Beck asserted a malpractice claim against L2P2. Most importantly, unlike the cases cited by Beck,[3] the defendants here did not use litigation specifically as an element of their alleged scheme to defraud,

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[2] *See, e.g., Local 355 v. Pier 66 Co.*, 599 F. Supp. 761, 765 (S.D. Fla. 1984); *Willis v. Lipton*, 947 F.2d 998, 1000-01 (1st Cir. 1991); *Rylewitz v. Beaton Services*, 698 F. Supp. 1391 (N.D. Ill. 1988), *aff'd*, 888 F.2d 1175 (7th Cir. 1989); *Mendelovitz v. Vosicky*, 40 F.3d 182 (7th Cir. 1994).

[3] *See e.g., Stochastic Decisions v. DiDomenico*, 995 F.2d 1158 (2d Cir. 1993) (predicate acts of bankruptcy fraud were specifically geared to avoid debt collection, thus directly

nor were legal fees an "intended consequence" of their acts. *Miller Hydro*, 851 F. Supp. at 13-14 n.6. They merely asked Beck to sign a contract. Therefore, Beck's legal fees were not the direct result of the alleged RICO violations and are not compensable.

Even if legal fees can be recovered under RICO, Beck's fraud claim is groundless. At pages 9-13 of his Statement of Material Facts, Beck alleges that he was fraudulently induced to guaranty a $7.5 million loan from First Fidelity Bank to SIG. The alleged fraudulent inducements consist of the following: (1) the use of false financial information, primarily regarding the Chief Structures situation; (2) concealment of CPC's practice of charging contractors prequalification and monitoring fees; and (3) a promise of continued employment. For the same legal reason set forth at pages 5 and 6 herein, these claims do not meet *H.J., Inc.'s* "pattern" requirement. Simply stated, even assuming these allegations amount to predicate acts, they occurred within a lightning fast period of time – one day – and not over a long period of time. Beck was asked – and agreed – to sign the Guaranty at a single December 1987 Board meeting. Reply Cert., Exh. C. Since the alleged fraud began and ended when Beck was asked and agreed to sign the Guaranty on one day in December 1987, there can be no "pattern" of racketeering.

Making this claim even more egregious is the fact that Beck does not cite anything in the record to show

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causing plaintiff to incur recoverable attorneys fees); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988) (plaintiff forced by predicate acts to defend frivolous lawsuits geared to avoid debt collection).

that he received any financial statements or projections before agreeing to sign the Guaranty. The *only* financial projection Beck points to was given to First Fidelity *only*, and was prepared, not by the Bellezza Group, but by SIG's financial department.[4] And Beck testified he did not receive this projection prior to signing the guaranty. Reply Cert., Exh. D. Clearly, Beck could not have relied on a document he did not know existed when he signed the Guaranty.[5]

Beck claims that he was unaware of the circumstances concerning Chief Structures. This assertion, however, is belied by Beck's own deposition testimony. Beck testified that before signing the Guaranty, he was aware: (1) that Chief was having financial difficulties; (2) that SIG was advancing money to Chief to help it complete its projects; (3) that the advances were being treated by SIG as "workouts"; (4) that the advances were part of a joint venture arrangement with Chief and SIG (or its subsidiary), since Beck himself signed SIG checks to Chief totalling hundreds of thousands of dollars containing the notations "joint venture" and "workout", Reply Cert.,

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[4] Beck has no evidence that the Bellezza Group falsified SIG's financial records. Indeed, it was Beck and other financial officers who were responsible for maintaining SIG's financial records and preparing its financial statements. Moreover, the statutory financial statements in existence before he signed the guaranty were certified by Beck himself, under penalty of perjury, as being accurate. Reply Cert., Exh. E. It is inconceivable how Beck can allege fraud when he supposedly relied on financial documents he himself prepared and signed.

[5] Moreover, projections of future financial performance clearly cannot be the basis of a fraud claim. *Royal Typewriter Co. v. Xerographic Supplies*, 719 F.2d 1092, 1105-06 (11th Cir. 1983).

Exh. F; and (5) that the advances to Chief could result in claims and that this would be a decision to be made by SIG's auditors. *See* Bellezza Group Statement of Material Facts at 16-17. In short, when a contracting party such as Beck possesses the substantial amount of knowledge in December 1987 that Beck *admits* he had, he cannot later claim fraud when he chooses to accept the risk. *Pelletier*, 921 F.2d at 1506-10; *see* cases cited in Bellezza Group Memorandum of Law at 11.

C. Beck Cannot Recover Damages for Loss of Employment

Beck argues that this court should follow the out of Circuit decisions in *Schiffels* and *Shearin*, which held that a terminated employee has standing to sue for a RICO conspiracy upon his discharge. But, the law in the Eleventh Circuit, under *O'Malley* and *Morast*, is to the contrary.[6] Most Courts agree that in a conspiracy case, a RICO plaintiff must have been injured by predicate acts, since RICO only targets criminal acts of racketeering. *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir. 1993); *Hecht v. Commerce Clearing House*, 897 F.2d 21,

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[6] The distinction Beck draws in footnote 10 of his Memorandum of Law, between an employee reporting conduct, and merely refusing to participate in that conduct, is meaningless. *O'Malley* expressly abrogated that distinction, which *Morast* had merely suggested in dictum. *O'Malley*, 887 F.2d at 1561. Moreover, the point of the whistleblower standing cases is that the plaintiff cannot recover because the predicate acts did not cause the injury, and this would be the case regardless of whether plaintiff "reported" or "refused to participate."

25 (2d Cir. 1990); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 48 (1st Cir. 1991); *Reddy v. Litton Industries*, 912 F.2d 291, 295 (9th Cir. 1990).[7]

D. Beck Cannot Recover for Failure to Sell Stock

Beck's [sic] argues that he can recover for his failure to sell stock. Beck Memorandum of Law at 16. But as every single court to consider the issue has held, Beck's "failure to sell" claim is simply another way of alleging diminution in value of stock, since ALL shareholders – not just Beck – were deprived of allegedly negative information about SIG. Therefore, the courts unanimously hold that a "failure to sell" claim is a derivative claim for which the stockholder does not have RICO standing. *See Crocker v. FDIC*, 826 F.2d 347, 350 (5th Cir. 1987); *Leach v. FDIC*, 860 F.2d 1266, 1273-74 (5th Cir. 1988); *Arent v. Distribution Sciences, Inc.*, 975 F.2d 1370, 1372-73 (8th Cir. 1992); *Chanoff v. U.S. Surgical Corp.*, 857 F. Supp. 1011, 1018, 1025 (D. Conn. 1994); *Schautteet v. Chester State Bank*, 707 F. Supp. 885, 890 (E.D. Tex. 1988). Moreover, had Beck alone received the information he claims was concealed

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[7] It goes without saying that Beck's termination, which began and ended in May 1988, does not constitute a pattern of racketeering activity under *H.J., Inc.* Moreover, the three acts of alleged fraud – the August 1986 stock/debenture purchase, the December 1987 guaranty, and Beck's May 1988 termination – cannot, combined, form a RICO pattern. Beck cannot establish "relatedness" merely by alleging different types of damages resulting from separate and distinct transactions having different purposes. *See Vild v. Visconsi*, 956 F.2d 560, 565-67 (6th Cir. 1992); *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 44-45 (1st Cir. 1991); *Hartz v. Freidman*, 919 F.2d 469, 474 (7th Cir. 1990).

from him, and then sold his stock for a profit prior to public disclosure, his profit would have resulted from unlawful insider trading. It is simply too much to ask to recognize an injury based on lost profit to which no one was lawfully entitled. *Crocker*, 826 F.2d at 351 n.6; *Arent*, 975 F.2d at 1374; *Chanoff*, 857 F. Supp. at 1018.

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DATED: April 26, 1995

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered to Jay Starkman, Esq., Starkman & Magolnick, P.A., Museum Tower, Suite 2701, 150 West Flagler Street, Miami, Florida, and furnished by

Federal Express this 26th day of April, 1995 to all counsel of record as listed on the attached service list.

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Order on the Bellezza Group's Motion for Summary Judgment

The full text of the Order appears in the Appendix to Petitioner, Robert A. Beck, II's, Petition for Writ of Certiorari at pages App. 23 - App. 46 and is, therefore, not duplicated in this Joint Appendix

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 95-4844

ROBERT A. BECK, II,

Plaintiff, Appellant,

vs.

RONALD M. PRUPIS, LEONARD BELLEZZA, ERNEST J. SABATO, WILLIAM PAULUS, JR., HARRY OLSTEIN, FREDERICK C. MEZEY, BYRON L. SPARBER, JOSEPH S. LITTENBERG,

Defendants, Appellees.

_____/

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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Bellezza, Leonard

Budd, Larner, et al.

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Chief Structures, Inc.

Construction Performance Corp.

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STATEMENT REGARDING ORAL ARGUMENT

Because of the size of the record, the complexity of the facts, the number and complexity of the issues and the amount of the damages sought, Beck respectfully requests oral argument.

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I. STATEMENT OF JURISDICTION

The judgment appealed from is a final judgment that disposed of all of Beck's claims. Thus, the Court's jurisdiction for this appeal rests in 28 U.S.C. §1291.

II. STATEMENT OF THE ISSUES

1. Does Beck have standing to assert a RICO claim for the damages he suffered directly as a result of the defendants' fraudulently inducing him to extend a $150,000 unsecured loan to their enterprise?

2. Does Beck have standing to assert a RICO claim for the damages he suffered directly as a result of the defendants' fraudulently inducing him to personally guaranty a $7.5 million loan to their enterprise?

3. Does Beck have standing to assert a RICO conspiracy claim for the damages he suffered as a result of the defendants' termination of him, where that termination was an overt act in furtherance of the defendants' conspiracy?

4. Does Beck have standing to assert a RICO claim for the damages he suffered directly as a result of the defendants' fraudulently inducing him to purchase stock in the defendants' enterprise?

5. Does Beck have standing to assert a RICO claim for the damages he suffered directly as a result of the defendants' fraudulently inducing him to forebear from selling his stock?

6. Was it an abuse of discretion for the District Court to decline jurisdiction over Beck's pendent state

law claims pursuant to 28 U.S.C. §1367, where Beck's action pre-dated the effective date of that statute and where Beck's state law claims are now barred by the applicable statute of limitations?

7. Was it an abuse of discretion for the District Court to dismiss Sparber for a failure to serve him, where Sparber's counsel filed a Notice of Appearance, participated in all pretrial events, and waited approximately four years to raise the defense, until after the statute of limitations had run?

III. STATEMENT OF THE CASE

A. Course of Proceedings and dispositions below.

On May 15, 1989, Beck filed a complaint in Florida Circuit Court, alleging a wrongful termination claim against SIG, and defamation and state RICO claims against the New Jersey Group, Sparber, Littenberg and others[1] (R5-160-EX3).

In that state action, the New Jersey Group filed a Motion to Dismiss Beck's state RICO claims, arguing that

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[1] "Beck" refers to plaintiff/appellant Robert A. Beck, II. "Bellezza" refers to defendant/appellee Leonard Bellezza. "Paulus" refers to defendant/appellee William Paulus, Jr. "The New Jersey Group" refers to defendants/appellees Bellezza, Paulus, Ernest Sabato, and Harry Olstein. "Littenberg" refers to defendant/appellee Joseph Littenberg. "Sparber" refers to defendant/appellee Byron Sparber. "The Defendant Directors" refers to all of the defendants in this action. "M&S" refers to Mandler & Silver, P.A., counsel for Littenberg and Sparber. "SIG" refers to Southeastern Insurance Group, Inc.

Beck did not have standing (R5-138-EX H). Based upon *Shearin v. E.F. Hutton*, 885 F.2d 1162 (3rd Cir. 1989), the Florida Circuit Court granted the motion as to the substantive RICO claims, but denied it as to the RICO conspiracy claims. *Id.* Beck's state RICO claims were based solely upon Beck's standing as a whistle blower, as that was the only claim in existence at the time (R5-160-EX3 at 24-34).

In or about early 1990, SIG filed for Chapter 7 bankruptcy (R5-138-EX F). At approximately the same time, the shareholders of SIG filed a derivative suit in New Jersey District Court, copying virtually all of the allegations of racketeering conduct directly from Beck's state court complaint (*Id.*). The shareholders named the same defendants as Beck's Florida Circuit Court action, with one addition – they also named Beck as a defendant (*Id*). Sparber was also named as a defendant in the shareholders' New Jersey action (*Id*). As Beck did not want to litigate the identical complex RICO issues in two separate forums, he voluntarily dismissed his RICO claim in Florida Circuit Court and, on May 5, 1990, re-alleged it as a cross-claim in New Jersey (R5-138-EX J).

Subsequently, the New Jersey District Court severed Beck's Cross-Claim and transferred it to the District Court for the Southern District of Florida (R1-1). Neither the Florida District Court nor the parties have ever been able to recover the portions of the file presumably transferred by the New Jersey District Court.

On June 21 1991, shortly after the case had been transferred to the Southern District of Florida, M&S filed *two separate* Notices of Appearance – one on behalf of

Littenberg, and the other on behalf of Sparber (R1-4; R1-5). The latter notice stated that M&S "are appearing as counsel in this cause on behalf of Defendant Byron Sparber" (R1-4). Since that time, attorneys from M&S have actively participated in this litigation, attending depositions, as well as receiving service copies of all documents filed (R1-36-3; R2-43-3; R2-44-21).

At the same time, M&S represented Sparber in at least five other actions relating to SIG, pending in Florida State Court: *Beck v. SIG, et al.*, Case No. 89-21551; *Beck v. Prupis, et al.*, Case No. 90-20978; *State of Florida, Department Of Insurance, as Receiver of Southeastern Reinsurance Co. v. Bellezza, et al.*, Case No. 91-09319; *State of Florida, Department of Insurance, as Receiver of Southeastern Reinsurance Co. v. Bellezza, et al.*, Case No. 90-49147; and *State of Florida, Department of Insurance, as Receiver of Southeastern Casualty & Indemnity Insurance Co. v. Bellezza, et al.*, Case No. 91-07334.

On November 30, 1994, Beck noticed the deposition of Sparber in this action (SR1). Shortly thereafter, for the first time, M&S argued that Sparber had not been served as a defendant and, thus, required a subpoena prior to appearing at a deposition (R2-64). Never, prior to that time, had M&S indicated that Sparber had not made an appearance as a defendant in this case.

On December 15, 1994, Sparber filed his Motion to Dismiss and Motion to Strike Notice of Appearance (R2-64). On May 3, 1995, the District Court granted the Motion, holding that Sparber had not been timely served (R6-168).

On March 30, 1995, the New Jersey Group filed its Motion for Summary Judgment (R5-136). On June 12, 1995, the District Court granted the New Jersey Group's Motion as to Beck's RICO claims, holding that Beck lacked standing to pursue those claims (R6-191 at 10-24). The District Court also dismissed Beck's pendent state law fraud and misrepresentation claims, pursuant to 28 U.S.C. § 1367(c)(3) (R6-191-24).

On July 5, 1995, Beck filed this appeal of the District Court's dismissal of Sparber as a party to this action, its grant of summary judgment on Beck's RICO claims, and its dismissal of Beck's pendent state law claims (R7-193).

B. Statement of the facts.

This is an action by Beck under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, for a pattern of racketeering activity committed by the Defendant Directors, former officers and directors of SIG (SIG also will be referred to as "the Enterprise"), by reason of which Beck has directly suffered damages (R5-160-EX1 at ¶¶1-145).

Beck's Complaint alleges that, beginning in or around the fall of 1985, the Defendant Directors devised a scheme and artifice to defraud Beck and others and, in addition, used their positions at SIG to extort potential customers (*Id.* at ¶¶11-13). As part of this scheme and artifice to defraud, the Defendant Directors fraudulently induced Beck to make an unsecured loan to the Enterprise, to purchase stock in the Enterprise and to refrain from selling that stock until it was too late, and to be a

personal guarantor on a $7.5 million loan to the Enterprise (*Id.* at ¶¶14-15, 61-78; R1-25). Moreover, when Beck became a threat to the continued racketeering conduct of the Defendant Directors, they fraudulently created causes for his termination (R5-160-EX1 at ¶¶12-13 and 43-60).

The Defendant Directors' racketeering activity included mail fraud, wire fraud and extortion, within the context of falsifying financial statements (*Id.* at ¶¶18-19 and 22), looting the Enterprise (*Id.* at ¶¶20-21, 33-35 and 37-41), extorting contractors (*Id.* at ¶¶23-30), set aside fraud (*Id.* at ¶31), fraudulent promises to indemnify (*Id.* at ¶32) and attempted options fraud (*Id.* at ¶36). Approximately 50 predicate acts are set forth in detail in the Complaint in order to fulfill RICO's pattern requirement (*Id.* at ¶¶79-128; *see also* R1-25).

1. The Criminal Conduct Committed Against Beck.

At the heart of Beck's action are the predicate acts that were committed directly against him, by which he directly suffered damages (R5-160-EX1 at ¶¶42-78). These are the predicate acts by which Beck was directly damaged and for which Beck is suing the Defendant Directors (*Id.*). There is substantial evidence supporting each of these predicate acts.

The first RICO predicate act committed by the Defendant Directors directly against Beck occurred in the summer of 1986, when the Defendant Directors fraudulently induced Beck to extend a $150,000 unsecured loan to their Enterprise and also to purchase some stock

therein (*Id.* at ¶¶74-78; R1-25-5). This fraudulent inducement was in connection with a private offering that commenced in the Spring of 1986 (R5-160-EX11). At that time, the Defendant Directors, in an effort to lure Beck into investing money in their Enterprise, purposefully hid from Beck their plans to remove Beck from his position as SIG's Chief Executive Officer ("CEO") after the private offering closed and after Beck had invested substantial sums in SIG (R5-161-EX14 at 58-59; R5-161-EX15 at 174-76; R5-161-EX16 at 24-25; R5-161-EX17 at 148-50). The Private Placement Memorandum circulated for the offering listed Beck as SIG's CEO (R5-160-EX11 at 42).

Unbeknownst to Beck, the Defendant Directors had already decided that Beck would not continue as SIG's CEO (R5-161-EX14 at 58-59). With this vital information fraudulently concealed from him, Beck extended a $150,000 unsecured loan to SIG and invested an additional $75,000 (to purchase SIG stock) (R5-161-EX12 at 113). If not for his reasonable belief that he would continue to be the CEO of the company, Beck would never have extended the loan or invested (R5-161-EX13 at 63-64).

The Private Offering closed on August 11, 1986. A meeting was held on August 18, 1986, exactly one week after the close of the offering (R5-161-EX14 at 16, 49-50). At this meeting, the Defendant Directors *"officially"* decided that Beck would no longer continue as the CEO of SIG (R5-161-EX15 at 174-76; R5-161-EX16 at 24-25; R5-161-EX17 at 148-50).

In addition, at the time, the Defendant Directors fraudulently hid from Beck some of the illegal manner in

which they were already operating their Enterprise. Specifically, the Defendant Directors fraudulently hid from Beck fraudulent representations that they had made to indemnify contractors in order to enable these contractors in which they had an interest to get bonds (R5-160-EX1 at ¶32; R1-25-6). Had Beck known of these fraudulent promises to indemnify, he would not have extended the $150,000 loan nor invested the additional $75,000 in the Enterprise (R5-160-EX9 at 31-34). The loan was never repaid and his investment was lost (R1-25 at 3-5).

Next, the Defendant Directors fraudulently induced Beck to personally guaranty a $7.5 million loan to SIG in December of 1987 (R5-160-EX1 at ¶¶74-78; R1-25 at 3-5). As part of their racketeering conduct, the Defendant Directors falsified SIG records and financial statements, resulting in a material overstatement of the value and net income of SIG and its subsidiaries (R5-160-EX1 at ¶¶18-22; R1-25 at 2-5). Beck relied on the fraudulently created financial statements and estimates in his assessment of the likelihood that SIG would be able to repay the First Fidelity loan (R5-160-EX18 at ¶2). As such, Beck was fraudulently induced to guaranty the loan (R1-25 at 3-5).

Specifically, the New Jersey Group and others caused SIG to treat claims made by Chief Structures, Inc. ("Chief") as a "workout," where claims payments made by SIG (an expense) were fraudulently portrayed as "notes receivable" (an asset) (R5-162-EX51 at 5; R5-161-EX30 at 5-6). Loss reserves for future claims payments were neither established nor reported (R5-161-EX17 at 215-18). This resulted in the fraudulent overstatement of

the financial condition of SIG by millions of dollars (R5-161-EX30 at 5-6; R5-162-EX51 at 5-6).

In the Summer of 1987, SIG was notified by Chief's owner, Steve West ("West"), that Chief would be unable to meet its obligations under construction contracts for which SIG's subsidiary ("SCI") had provided bonds (R5-161-EX19 at ¶¶6-8). This created a claim against the bonds which had been previously issued by SCI (*Id*).[2] Chief requested that SIG provide funds to keep the projects from going into default (*Id*).

Thereafter, West requested additional bonds (R5-161-EX20 at 4). Bellezza agreed to sign a general indemnity agreement to enable the new bonds to be issued by SCI (R5-161-EX21 at 91-92; R5-161-EX20 at 5). Because Bellezza's fee could not be paid directly to him from an insurance company without violating insurance laws, Construction Performance Corporation ("CPC"), a SIG non-insurance affiliate, was used as a "front" (R5-161-EX23 at 100-18). Despite his representation, Bellezza never executed this general indemnity agreement (R5-161-EX20 at 5).

Several of the Defendant Directors (including, especially, Bellezza and Paulus) drafted an agreement for West to execute. (*Id*. at 4-5; R5-161-EX17 at 102-03). This agreement provided: (1) West and Chief would form a new entity and 10% of the shares would be owned by

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[2] At this time, various members of the New Jersey Group and the Defendant Directors were either in charge of working out claims or had specific responsibilities in connection with claims and/or Chief (R5-161-EX20 at 6-7; R5-161-EX22 at 5-6).

CPC, which would elect one half of the Board of Directors; (2) CPC would provide financial guarantees to SCI in order for SCI to issue the new bonds to Chief; (3) CPC would "arrange" for funds to be loaned to Chief-FL to complete projects bonded by SCI; (4) Bonds issued prior to the agreement would be classified as Group A bonds and new bonds issued after the agreement would be classified as Group B bonds; and (5) CPC would receive 50% of the profits on all bonds in Group B, but not less than $500,000 (R5-161-EX24).

The profit participation of CPC on construction projects bonded by SCI was a requirement for the surety bonds to be issued (R5-161-EX15 at 89-90, 129, 137-40; R5-161-EX23 at 87-90; R5-162-EX50 at 2). The CPC fees were payable in addition to the premium payable to SCI (R5-161-EX23 at 112, 117-18; R5-162-EX50 at 3). These CPC fees thus constituted an illegal and excessive premium in direct violation of insurance laws (R5-161-EX23 at 100-18; R5-162-EX50 at 3-4).

West was extorted and coerced into agreeing to pay the illegal and excessive premiums to CPC (R1-25 at 12, 17, 21; R5-160-EX1 at ¶¶24, 25, 127). Furthermore, the arrangement of loans by CPC to Chief was a sham of CPC fronting for the SIG insurance subsidiaries, which actually did advance funds to Chief (R5-162-EX50 at 2-3). Such loans were, however, prohibited under Florida insurance law (R5-161-EX25 at 246-49; R5-161-EX26).

The September 10, 1987 Joint Venture Agreement was executed at a time when there were claims and losses on the bonds previously issued to Chief (the A-bonds) (R5-161-EX17 at 78-84; R5-161-EX15 at 90-93; R5-161-EX24

at 1). This agreement therefore allowed the Defendant Directors to hide the losses, and actually characterize them as an asset (R5-160-EX1 at ¶19).

Prior to the closing of the First Fidelity loan, no report had been made of any claim on the Chief bonds (R5-161-EX18 at ¶3). In fact, two Claims Summaries (R5-161-EX27 and EX28) were mailed to Beck and others at or around that time (R5-161-EX13 at 149). There was no listing of the Chief bonds in these Claims Summaries (R5-161-EX18 at ¶3C; R5-161-EX13 at 149). These Claims Summaries were also used to reflect the loss expense and loss reserve in the September 30, 1987 financial statements of SIG and its insurance company subsidiaries (R5-161-EX18 at ¶3). This information was not known by Beck when he executed the First Fidelity guaranty on December 31, 1987 (*Id.*).

The omission of the Chief claims was a material fact. The Chief claims eventually amounted to paid losses for SIG in excess of $6 million (R5-161-EX29).

Thus, through the fraudulent misrepresentations of the Defendant Directors, Beck was unaware of the following material facts when he executed the First Fidelity guaranty: (1) The September 10, 1987 Joint Venture Agreement was in existence; (2) Chief was in reality a claim and a loss to SIG; (3) The Claims Worksheets did not include a significant claim (in fact, Chief was SIG's largest claim); (4) SIG had changed its policy and was handling claims situations by issuing new bonds to defaulting contractors in the hope that they would work their way out of their claims; and (5) The SIG financial statements fraudulently overstated the value of SIG by

$3-6 million (R5-161-EX18 at ¶3). Had Beck known these facts, he would not have executed the personal guaranty (*Id.*; R1-25 at 3-5).

The New Jersey Group also fraudulently concealed information from Beck regarding the illegal manner in which SIG was operated. In early 1987, the New Jersey Group and others conspired to create a separate corporation, CPC, in order to cover up their illegal manner of operating SIG (R5-161-EX15 at 18-23; R5-161-EX23 at 105-08). CPC was established for the purpose of extorting contractors applying for surety bonds from the SIG insurance subsidiaries (*Id.*; R5-161-EX31 at 47-50; R5-160-EX1 at ¶23). This was done by forcing the contractors to pay illegal fees (from 50% to 300% of the bond premium) to CPC to qualify for surety bonds, in addition to the surety bond premium payable to the SIG insurance subsidiaries (R5-161-EX15 at 180; R5-161-EX23 at 105-08; R5-160-EX1 at ¶23; R5-162-EX50 at 3-4; R5-161-EX18 at ¶4).

Contractors seeking bonds from the SIG insurance subsidiaries were threatened (extorted) that, unless they agreed to pay these illegal fees to CPC, bonds would not be issued (R5-161-EX15 at 194; R5-161-EX32 at 86-87; R5-160-EX1 at ¶24; R5-162-EX50 at 3-4). Over one hundred contractors applying for SIG surety bonds were forced to agree to pay fees to CPC (R5-161-EX33). In most cases, the financial condition of these contractors prevented them from obtaining bonds elsewhere (R5-161-EX23 at 83, 120-21).

One example of this illegal conduct involved JJW Construction, Inc. ("JJW"). JJW, an applicant for surety insurance at SIG's insurance subsidiary, was extorted to

pay a $275,000 fee to CPC in exchange for the posting of a $500,000 letter of credit from Bellezza (R5-161-EX15 at 58-59; R5-161-EX32 at 42-45, 75-76; R5-161-EX34 at 126-30; R5-161-EX25 at 84-86, 336 and 343; R5-161-EX35; R5-161-EX18 at ¶4; R5-161-EX30 at 4; R5-160-EX1 at ¶¶24-25, 97-105).

To prevent their illegal operation of SIG from being exposed, the Defendant Directors conspired to fraudulently conceal CPC's operations from Beck (R5-161-EX15 at 12-17; R5-161-EX21 at 57-58; R5-161-EX25 at 84-86, 336, 338). Thus, as a result of the fraudulent misrepresentations by the Defendant Directors, Beck was unaware of the following material facts when he executed the First Fidelity guaranty: (1) Contractors were being extorted to execute agreements with CPC as a condition to obtain bonds; (2) JJW had agreed to pay a $275,000 fee, in addition to the bond premium, to obtain bonds; and (3) CPC was charging fees in excess of the premiums allowed under Florida law (R5-161-EX18 at ¶4). Had Beck known of these facts, he would not have guaranteed the December 31, 1987 First Fidelity loan to SIG (*Id.*).

In order to further induce Beck to execute the guaranty, the Defendant Directors also fraudulently concealed from Beck their plans to terminate him from his position as president of SIG (R1-25 at 3-5). Prior to Beck's execution of the First Fidelity guaranty, the Defendant Directors had already conspired to remove his responsibilities and duties, and to eventually remove Beck from office, all in order to facilitate their illegal conduct (R5-160-EX1 at ¶66). In early December of 1987, some of the Defendant Directors met and discussed Beck's termination (R5-161-EX20 at 9). These plans to terminate Beck were known by

all of the SIG directors, other than Beck (*Id.*; R5-161-EX18 at ¶5). In fact, at this time, the plans to terminate Beck were known throughout SIG (R5-162-EX36 at 26-30, 104-06). By eliminating Beck from the "information loop," however, the Defendant Directors were able to hide this information from Beck, until after his termination, which occurred five (5) months after his execution of the guaranty (R5-161-EX20 at 9; R5-161-EX18 at ¶5; R5-162-EX36 at 26-36, 39, 104-106, 129-30; R5-161-EX16 at 32-35; R5-162-EX37 at 24, 36-7; R5-162-EX38 at 7-10).

Thus, as a result of the fraudulent misrepresentations and concealment by the Defendant Directors, Beck was unaware of the material fact that the Defendant Directors had plans to terminate him (R5-161-EX18 at ¶7; R1-25 at 3-5). Had Beck known of the plans to terminate him, he would not have executed the guaranty (*Id.*). After SIG's bankruptcy, First Fidelity Bank filed suit against Beck, where he incurred substantial fees (R1-25-11; *First Fidelity Bank v. SIG, Beck, et al.*, Case No. ESX-L-018026-89 (N.J.)).

The Defendant Directors made fraudulent misrepresentations to Beck that caused him to retain and forebear from selling his holdings of SIG stock. Beginning in the spring of 1987, Beck considered selling this stock (R5-160-EX10 at 273-75). However, because of the fraudulent financial statements, the fraudulent concealment of the illegal manner in which the Defendant Directors were operating SIG and the fraudulent misrepresentations about the plans to terminate Beck, Beck did not sell the stock. Had Beck known these things, he would have sold the stock before it was too late (*Id.*; R5-160-EX9 at 53-58).

Pursuant to their racketeering conspiracy, the Defendant Directors purposely kept Beck out of the information loop at SIG (R5-162-EX36 at 26-36, 39, 104-106, 129-30; R5-161-EX16 at 32-35; R5-162-EX37 at 24, 36-37; R5-162-EX38 at 7-10). In fact, SIG employees were specifically instructed to withhold essential information from Beck (*Id.*; R5-162-EX39 at 23-25).

Nevertheless, in the Spring of 1988, Beck began to discover some of the illegal conduct. He prevented the theft of over $2 million from SIG's Florida insurance subsidiaries (R5-162-EX40 at 66; R5-161-EX12 at 172-73).[3] In addition, Beck contacted SIG's regulators and advised them that he had come to believe that the company's financial statements may have been overstated (R5-162-EX41 at 6-7, 19; R5-161-EX12 at 154-58).

Seeing Beck as a threat to their continued criminal conduct, the Defendant Directors embarked on a scheme to fraudulently create causes to terminate Beck (R5-162-EX36 at 26-36, 39, 104-06, 129-30; R5-162-EX39 at 23-25, 42-46; R5-162-EX42 at 15-16, 71-73; R5-162-EX43 at 80-85; R5-161-EX12 at 171-73; R1-25-3). Through a series of secret meetings from which Beck was excluded, the New Jersey Group and the other Defendant Directors hatched their conspiracy with Firemark Consultants, Inc. ("Firemark"), a consulting company (R1-25-11), Firemark's chairman confessed that Firemark fabricated things about Beck and recommended his termination because the president of Firemark wanted Beck's job (R5-162-EX44 at

[3] As more fully detailed, *infra* at 17-18, after Beck's termination, the Defendant Directors proceeded to commit this theft.

17-18). Firemark also fabricated documents to substantiate its recommendation to terminate Beck (*Id.*; R5-162-EX47 at 42-43). On May 13, 1988, the Defendant Directors and Firemark did, in fact, terminate Beck (R5-160-EX1 at 12-17). As part of Firemark's reward for its participation, the Defendant Directors gave Firemark's president Beck's job (R5-161-EX16 at 80-81; R5-162-EX48 at 372-73).

Thus, by reason of the Defendant Directors' racketeering conduct, Beck was directly damaged as follows: 1) he was fraudulently induced to purchase SIG stock and otherwise invest in the Defendant Directors' Enterprise; 2) he was fraudulently induced to forebear from selling his stock; 3) he was fraudulently induced to personally guaranty a $7.5 million loan to the Defendant Directors' Enterprise; and 4) he was terminated for fraudulently created causes as a result of his threat to the Defendant Directors' continuing criminal conduct.

2. The Criminal Conduct Committed Against Others.

In addition to the above-described predicate acts committed against Beck, there is also substantial evidence of predicate acts committed by the Defendant Directors against other victims, all of which form the *pattern* of racketeering conduct.

First, hundreds of contractors were extorted (R5-161-EX15 at 34-35, 58-61, 180, 202-05; R5-161-EX34 at 127-28; R5-161-EX25 at 100-01, 336, 344; R5-161-EX23 at 103).

Additionally, the Defendant Directors looted SIG and its subsidiaries (R5-160-EX1 at ¶¶20-22; R5-162-EX51 at

11-12; R1-25-2). For example, after Beck's termination, $2.5 million of policyholder surplus was stolen from SIG's subsidiaries and transferred to Bellezza, Olstein and others (R5-162-EX50 at 5-7; R5-162-EX51 at 9-12; R5-162-EX40 at 66-68). $4 million of policyholder surplus was stolen from SIG's subsidiaries and transferred to First Fidelity Bank (R5-162-EX50 at 6-7; R5-162-EX51 at 3, 11-12). Substantial funds also were taken improperly from one of SIG's subsidiaries by the back-dating of a reinsurance pooling agreement (R5-162-EX50 at 5; R5-162-EX51 at 7-8). $3.6 million of surplus interest was paid to SIG and used primarily to fund debenture-holder payments (the vast majority of which were paid to the Defendant Directors), while this money should have been paid to other parties (R5-162-EX51 at 8; R5-162-EX52 at 27, 64; R5-162-EX53 at 161-68; R5-160-EX4; R5-160-EX5; R5-160-EX6).

Moreover, the fraudulent financial statements created by the Defendant Directors were not only used to victimize Beck. In addition, these fraudulent financial statements were mailed to regulators, shareholders and creditors (R5-162-EX53 at 182-83; R5-162-EX43 at 25-26, 153-57, 182; R1-25-2).

The Defendant Directors also made fraudulent promises to indemnify SIG's insurance company subsidiaries so that bonds could be written to contractors in which the Defendant Directors had some interest. *See supra* at 7-11. A further example of this fraudulent conduct involves Aldrich Construction Co. (R5-162-EX54 at 2; R5-161-EX20 at 2-3; R5-161-EX34 at 98-115; R1-25 at 5-6).

C. Statement of the standards of review.

The District Court's entry of summary judgment on Beck's RICO claims is reviewed under a *de novo* standard. *Rice v. Branigar Organization, Inc.*, 922 F.2d 788, 790 (11th Cir. 1991); *Thrasher v. State Farm Fire & Casualty Ins. Co.*, 734 F.2d 637, 638 (11th Cir. 1984). Thus, on appeal, the appellate court applies the same standards for summary judgment as does the district court in initially ruling on the motion. *See Buxton v. City of Plant City, Florida*, 871 F.2d 1037, 1040 (11th Cir. 1989); *Thrasher*, 734 F.2d at 638.

On any motion for summary judgment, the burden of establishing the absence of a genuine issue of fact is on the movant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Griffin v. Kraft General Foods, Inc.*, 62 F.3d 368, 371 (11th Cir. 1995). The court must view the evidence in a light most favorable to the non-moving party and indulge every reasonable inference from the facts in his favor. *Harris v. Ostrout*, 65 F.3d 912, 915 (11th Cir. 1995); *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir. 1987). There must be *no* genuine issue as to *any* material fact. *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 458 (11th Cir. 1994). Before summary judgment is granted, "the facts and inferences [must] point so strongly and overwhelmingly in favor of one party, that the Court believes that reasonable men could not arrive at a contrary verdict. . . ." *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969).

The District Court's dismissals of Beck's claims against Sparber and Beck's pendent state law claims are reviewed under an abuse of discretion standard. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Rice*, 922

F.2d at 792; *Tinker v. DeMaria Porsche-Audi, Inc.*, 632 F.2d 520, 523 (5th Cir. 1980).

IV. SUMMARY OF THE ARGUMENT

Beck has asserted civil RICO claims in various capacities. As Beck directly suffered damages for each of these claims, he has standing to assert them. Therefore, the District Court erred in entering summary judgment against him.

First, Beck was fraudulently induced to extend an unsecured loan that was never repaid to the Defendant Directors' enterprise by misrepresentations made by the Defendant Directors to Beck relating to Beck's office and the Defendant Directors' illegal conduct. As such, Beck's injury flowed from the fraudulent conduct that induced him to make the loan, not the general diminution in the assets of the company. He was directly injured by the Defendant Directors' RICO conduct. His injury is not derivative, but rather, it is distinct from that of general creditors whose loss was due solely to the bankruptcy of the enterprise.

Next, Beck was fraudulently induced to personally guaranty a $7.5 million loan to the Defendant Directors' enterprise by misrepresentations made by the Defendant Directors to Beck relating to the value of the company, illegal conduct at the company, and plans to terminate Beck. Again, as this Circuit has already held, a plaintiff has standing to assert a RICO claim for the damages suffered by virtue of this fraudulent inducement, as he directly suffers injuries by virtue of the defendants' RICO conduct.

Further, Beck was terminated as an overt act in furtherance of the Defendant Directors' RICO conspiracy so that the Defendant Directors could continue their criminal conduct. While there is some split in authority, the weight of law from other Circuits, the language of the RICO statute, traditional conspiracy jurisprudence and public policy all support the proposition that such a terminated whistle blower should be given standing to assert a RICO *conspiracy* claim. While it is unclear, it appears that this Circuit has not yet expressly dealt with the issue of the standing of a person in this situation to assert a RICO conspiracy claim.

Beck was also fraudulently induced to purchase stock in the Defendant Directors' enterprise. Once again, Beck's injuries are direct, flowing from the fraudulent conduct that was targeted at Beck, not from the subsequent diminution in the value of the company. Moreover, Beck was fraudulently induced to forebear from selling his stock. Given that he had business relationships with the Defendant Directors and that he was their co-director, the Defendant Directors owed Beck a duty separate from that owed to other shareholders. The fraudulent misrepresentations that caused Beck to fail to sell his stock until it was too late caused an injury directly to Beck for which he has standing to sue.

The District Court also dismissed Beck's pendent state law claims pursuant to 28 U.S.C. § 1367. This statute, however, is not applicable to Beck's claims, as Beck's action pre-dated its effective date. Under the applicable common law, it was an abuse of discretion to decline jurisdiction over Beck's state claims, as the statute of limitations on those claims has passed.

Last, the District Court dismissed Beck's claims against Sparber due to a failure to serve him. After this action was transferred to Florida, however, Sparber's counsel filed and served a Notice of Appearance on Sparber's behalf. Sparber's counsel then participated in all pretrial activities. Approximately four years later, after the statute of limitations had passed, Sparber first raised his service defense. Given these facts (which should constitute waiver of the defense), it was an abuse of discretion to grant Sparber's motion.

V. ARGUMENT

A. Background standing law.

Under 18 U.S.C. § 1964(c), a plaintiff can assert a civil RICO claim if "he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Thus, in order to have standing to assert a civil RICO claim, a plaintiff must show: (1) that section 1962 has been violated, (2) that an injury has occurred to the plaintiffs' business or property and (3) that the violation caused the injury. *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir.), *modified*, 30 F.3d 1347 (11th Cir. 1994).

The causation element of RICO's standing criteria requires RICO plaintiffs to prove proximate causation before they are permitted to recover. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). This requirement entails applying "[c]ausation principles generally applicable to tort liability" to RICO cases. *Cox*, 17 F.3d at

1399. A proximate cause, however, is not the same thing as a sole cause. *Id.* The test for proximate causation is whether the defendant's actions are "a substantial factor in the sequence of responsible causation," and whether "the injury is reasonably foreseeable or anticipated as a natural consequence." *Id.*; *Standardbred Owners Assn v. Roosevelt Raceway*, 985 F.2d 102, 104 (2d Cir. 1993).

The predicate acts alleged by Beck include mail and wire fraud, 18 U.S.C. §§1341 and 1343. Mail or wire fraud occurs when a person intentionally participates in a scheme to defraud another of money or property, and uses (or knowingly causes another to use) the mails or wires in furtherance of that scheme. *United States v. Downs*, 870 F.2d 613, 615 (11th Cir. 1989). One "knowingly causes" another to use the mails or wires "[w]here one does an act with knowledge that [their] use will normally follow in the ordinary course of business, or where such can reasonably be foreseen, even though not actually intended. . . . " *Pereira v. United States*, 347 U.S. 1, 8-9, (1954) (citations omitted); *see also Downs*, 870 F.2d at 615. Accordingly, knowing participants in a scheme to defraud are legally liable for their co-schemers' use of the mails or wires in furtherance of that scheme. *United States v. Lothian*, 976 F.2d 1257, 1263 (9th Cir. 1992); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1354 (5th Cir. 1984). Such participants are also liable when innocent parties or even victims make use of the mails or wires as a result of the scheme. *See Schmuck v. United States*, 489 U.S. 705, 711-12 (1989).

The "in furtherance" component of mail and wire fraud is "to be broadly read and applied." *United States v. Draiman*, 784 F.2d 248, 251 (7th Cir. 1986). Thus, it is not

necessary that the scheme contemplate the use of the mails as an essential element. *United States v. Maze*, 414 U.S. 395, 400 (1974). It is sufficient that the mailing caused is a "part of the execution of the fraud," *Kann v. United States*, 323 U.S. 88, 95 (1944), or is "incident to an essential part of the scheme," *Pereira*, 347 U.S. at 8, or is "a step in the plot." *United States v. Hollis*, 971 F.2d 1441, 1448 (10th Cir 1992) (citations omitted). The mailing or wire communication itself need not be fraudulent in nature nor is it necessary that the communication "contributed directly to the duping" of the intended victims. *Schmuck*, 489 U.S. at 712.

For a plaintiff to recover under RICO for mail or wire fraud damages, he must show that he was a target of the scheme to defraud and must have relied to his detriment on misrepresentations or material omissions made in furtherance of that scheme. *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991), *cert. denied*, ___ U.S. ___, 114 S.Ct. 311 (1993).

B. Beck's claim for fraudulent inducement to extend a $150,000 loan to SIG.

Beck's damages relating to the $150,000 loan that he was fraudulently induced to extend were proximately caused by the Defendant Directors' RICO violations, and were suffered by Beck directly, not derivatively. This claim is based upon the predicate acts of mail and wire fraud. Beck has introduced evidence from which a jury could find that the Defendant Directors are responsible for committing these predicate acts against him. *See supra* at 6-8.

In its Order granting Summary Judgment, the District Court found that Beck did not produce any evidence of the Defendant Directors making *affirmative* representations to Beck promising him that he would remain as SIG's CEO (R6-191 at 16-17). This finding ignores the evidence. *See, e.g.*, R5-160 at 42 and 44. Regardless, such a showing is not required. It is well-settled that nondisclosure of a material fact with intent to create a false or fraudulent misrepresentation is sufficient to constitute mail or wire fraud, RICO predicate acts. *Pelletier*, 921 F.2d at 1508; *Houben v. Harmon*, 605 F.2d 920, 924 (5th Cir. 1979) (affirmative duty to disclose exists where the facts are solely within the knowledge of the defendants or where some trick or artifice has been employed to thwart independent investigation); *United States v. DeCastris*, 798 F.2d 261, 263 (7th Cir. 1986) ("Concealing information known to be pertinent to a proper decision may be a fraudulent scheme" under the mail fraud statute); *United States v. O'Boyle*, 680 F.2d 34, 36 (6th Cir. 1982) (a false or fraudulent representation "may be made by statements of half truths or the concealment of material facts, as well as by affirmative statements or acts."); *United States v. Allen*, 554 F.2d 398, 410 (10th Cir. 1977) (same); *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979) (same); *Pulte Home Corp. v. Ply Gem Industries, Inc.*, 804 F.Supp. 1471, 1483 (M.D. Fla. 1992) (fraud may arise from circumstances which indicate concealment or nondisclosure of a material fact where the victim does not have equal access to the information).

The evidence presented by Beck, at minimum, raises a jury question on this issue. To further their fraudulent scheme, the Defendant Directors intentionally hid from

Beck the material fact that they intended to remove Beck from his role as CEO of SIG immediately after the closing of the Private Placement Offering. *See supra* at 6-7. In addition, the Defendant Directors fraudulently concealed their illegal conduct from Beck. *Id.* at 7-8. As a result of these fraudulent misrepresentations, Beck was induced into making the unsecured $150,000 loan. *Id.* at 6-8.

Contrary to the District Court's holding, this RICO injury suffered by Beck is not derivative – it is sufficient to establish RICO standing. Illustrative of this point is this Court's decision in *Warner v. Alexander Grant & Co.*, 828 F.2d 1528 (11th Cir. 1987). *Warner* arose out of the collapse of ESM Governmental Securities, Inc. and its corporate affiliates ("ESM"). *Id.* at 1529. Warner alleged that he was directly injured when he made $18 million in capital contributions as a result of false and misleading information contained in ESM's financial statements prepared by Alexander Grant & Co. ("Grant"), ESM's auditor. *Id.* at 1530-31. The district court dismissed Warner's action as derivative. This Court reversed, holding:

> Warner also appears to allege that as a result of the Grant financial statements, he was a direct participant in a "down stream merger" between Home State and Home State Financial in which he was required to contribute $18 million in real property to the capital of Home State. . . . If this contribution occurred as a result of the Grant statements directed to Warner personally, any injuries arising therefrom were suffered by Warner personally, not derivatively.

Id. at 1531.

Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989), is also on point. In *Ashland Oil*, the plaintiffs alleged a fraudulent scheme in which the defendants, the Arnetts, employed false financial statements to induce Ashland Oil to advance Arnett Oil large quantities of petroleum products on credit. *Id.* at 1272-73. The Arnetts then looted Arnett Oil, driving it into bankruptcy, *Id.* at 1274-75. The Arnetts raised the identical standing argument raised by the Defendant Directors and accepted by the District Court below in the instant case. The Arnetts argued that, diverting the assets of Arnett Oil, their actions injured the corporation directly and the plaintiffs only derivatively. *Id.* at 1279-80. Moreover, the Arnetts argued that only the trustee for the bankrupt Arnett Oil had standing to sue and "that the plaintiffs would have only the rights of bankruptcy estate creditors." *Id.*

The Seventh Circuit rejected the Arnett's erroneous standing argument on the basis that the direct fraud perpetrated on the plaintiffs placed them on a different level from the run-of-the-mill creditor:

> Here, the plaintiffs have shown a distinct injury from that of other creditors. Although a part of the underlying scheme was the diversion of corporate assets (for which the trustee may well have a cause of action against the Arnetts), an essential part of the scheme, on which its success depended, was the fraudulent taking from the plaintiffs of exceptionally large quantities of fuel. We conclude that the facts show an injury to the plaintiffs significantly different from the injuries to creditors in general resulting from the diversion of corporate assets.

Id. at 280.

Similarly, in *In re Colonial Ltd. Partnership Litigation*, 854 F. Supp. 64 (D. Conn. 1994), the plaintiffs (like Beck) alleged that the defendants' fraudulent conduct induced them to purchase their limited partnership interest, which eventually became worthless. *Id.* at 105. Exactly like the Defendant Directors, the defendants in *Colonial* argued that an investor in a limited partnership lacked standing to assert a claim because the injury was suffered by the partnership and the diminution in the value of the plaintiffs' investment was a derivative injury. *Id.* at 104. The court unequivocally rejected the defendants' argument:

> In the instant case, the plaintiffs do not seek recovery for an injury that is "derivative" of the injury, if any, suffered by the limited partnership. The plaintiffs do not merely claim that they suffered a diminution in the value of their investments; rather, they claim that the defendants' fraudulent conduct induced them to purchase their limited partnership interests, and that the result was reasonably foreseeable to defendants. Thus, the plaintiffs have alleged that they were directly injured by the defendants' conduct. These allegations clearly satisfy the test for proximate causation. Accordingly, the plaintiffs have standing to sue under RICO.

Id. at 105.

Additionally, in *Banker's Trust v. Rhoades*, 859 F.2d 1096 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989), the plaintiffs, creditors of a bankrupt corporation, sought recovery for acts of bankruptcy fraud and bribery that concealed a corporate asset during reorganization. *Id.* at 1098-99. The district court held that the plaintiffs lacked

standing to pursue RICO claims against the corporation's directors because that right belonged solely to the corporation itself – whose value had been depleted by the fraudulent transfer of its assets. *Id.* at 1100. The Second Circuit reversed, holding that, because the creditors suffered injuries *directly*, they would be allowed to pursue their claim notwithstanding the possibility that the "bankrupt corporation might also have suffered an identical injury for which it has a similar right of recovery." *Id.* at 1101. *See also Yates v. Jones National Bank*, 206 U.S. 158, *rev'd. in part on other grounds*, 206 U.S. 181 (1907) (creditor could sue individually); *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991) (plaintiff's allegations that he relied on defendant's misrepresentations that induced plaintiff to purchase company's stock satisfy section 1964(c)'s proximate cause requirement); *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042 (2nd Cir.), *cert. denied*, 479 U.S. 950 (1986) (where plaintiff alleges that it suffered damages from the fraud of a director of a bankrupt corporation, plaintiff has a right to recover separate from any claim the bankrupt corporation may have); *GICC Capital Corp. v. Technology Finance* Group, 30 F.3d 289 (2nd Cir. 1994), *aff'd*, 67 F.3d 463 (2nd Cir. 1995) (creditor has individual standing as long as his injuries meet proximate cause test); *Morley v. Cohen*, 888 F.2d 1006 (4th Cir. 1989) (plaintiff who is fraudulently induced into investing in defendant's scheme has RICO standing); *Haggiag v. Brown*, 728 F.Supp. 286, 295 (S.D.N.Y. 1990) (allegation that plaintiffs were fraudulently induced into loaning money to defendant states viable RICO claim).

In the present case, the District Court incorrectly held that "Beck's injuries as a creditor are no different than

any other creditor of SIG" (R6-191 at 18). Beck's claim regarding his $150,000 loan to SIG is different from that of other creditors whose injuries were derivative, in that Beck's claim is for fraudulent inducement. As with the plaintiffs in the above-described cases, Beck's injuries flow from the Defendant Directors' fraudulent conduct that induced Beck, directly, to loan SIG money, causing damages directly to Beck. At the time of the fraudulent conduct, Beck was not yet a creditor. Beck became a creditor only after, and as a direct result of, the Defendant Directors' successful scheme to defraud him. The scheme targeted Beck, and Beck fell victim to the material omissions aimed at inducing him into extending the unsecured loan to SIG. Beck's claim is for that fraudulent inducement, not the subsequent diminution in his ability to collect on the loan when the Defendant Directors caused SIG damages.

On the other hand, a typical creditor of SIG was not injured directly by the Defendant Directors' racketeering conduct. The typical creditor suffered damages solely derivatively, by reason of the damage done to SIG by the Defendant Directors after the credit had been extended.

The Defendant Directors' actions that fraudulently induced Beck to loan SIG money were "a substantial factor in the sequence of responsible causation," and Beck's "injur[ies] [were] reasonably foreseeable or anticipated as a natural consequence" of those actions. *Cox*, 17 F.3d at 1397; *Standardbred*, 985 F.2d at 104. This fraudulent inducement is precisely the type of conduct for which 18 U.S.C. §1964 provides a remedy.

C. Beck's claim for fraudulent inducement to guaranty a $7.5 million loan.

Beck has presented evidence that, pursuant to a scheme to defraud that targeted Beck and others – a scheme furthered by the Defendant Directors' use of the mails and wires – Beck was fraudulently induced to personally guaranty a $7.5 million loan from First Fidelity Bank to SIG, by which he has been directly injured. *See supra* at 8-14. Specifically, Beck was fraudulently induced by the Defendant Directors to personally guaranty the loan by the Defendant Directors' fraudulent misrepresentations of SIG's value, their fraudulent concealment of their illegal conduct, and their fraudulent concealment of their plans to terminate Beck. *Id.* This Court has expressly held that this type of allegation states harm suffered by an individual *directly*, not derivatively. *See, Warner*, 828 F.2d at 1531 & n.2 (plaintiff fraudulently induced into entering guaranty states RICO claim personally, not derivatively). This Eleventh Circuit holding was ignored by the District Court.

Moreover, guarantors are a form of "contingent creditors." *Mid-State Fertilizer v. Exchange Nat'l Bank*, 877 F.2d 1333, 1336 (7th Cir. 1989). Thus, the points and authorities contained in Section V(B), *supra*, equally support Beck's standing to pursue his guaranty claim.

The attorneys' fees incurred by Beck in defending the claim by First Fidelity Bank on the fraudulently induced guaranty present a proximately caused injury, the redress of which Beck has standing to pursue here. *See, e.g., Stochastic Decisions, Inc. v. Didomenico*, 995 F.2d 1158, 1167 (2nd Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 385 (1993)

(legal fees may constitute RICO damages if proximately caused by a RICO violation); *Malley-Duff & Associates v. Crown Life Ins. Co.*, 792 F.2d 341, 355 (3rd Cir. 1986), *aff'd*, 483 U.S. 143 (1987) (litigation expenses caused by predicate acts recoverable under RICO); *Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496 (9th Cir. 1985) (same); *Alexander Grant & Co. v. Tiffany Ind.*, 742 F.2d 408, 411 (8th Cir. 1984) (same), *readopted*, 770 F.2d 717 (8th Cir. 1985).

The very nature of these damages sought by Beck further proves that his injury is not derivative of the harm inflicted upon SIG. The District Court incorrectly reasoned that Beck's guaranty damages are derivative because "[i]f SIG were restored, Beck would be restored because SIG then would be able to pay its debts . . . to others – thereby relieving Beck of his obligation to pay as guarantor . . . [of] the First Fidelity loan" (R6-191 at 18). A full recovery by SIG, however, would not restore Beck. Even if SIG obtained the funds to pay back the First Fidelity loan, SIG would be under no obligation whatsoever to reimburse Beck for his legitimate mitigation expenses, the damages for which Beck is suing here.

D. Beck's RICO conspiracy claim.

1. This Court has not ruled on this issue yet.

The District Court's entry of summary judgment against Beck on his whistle blower RICO conspiracy claim was based upon two Eleventh Circuit cases: *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), and *O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) (R6-191 at 20-21). Neither of the two cases, however, denies Beck standing to raise his claim.[4]

First, *Morast* does not stand for the proposition that whistle blowers are absolutely barred from asserting a RICO conspiracy claim. In *Morast*, the complaint alleged that the plaintiff was discharged without justification and purely in retaliation for his reporting an irregular transaction and cooperating with the subsequent investigation. 807 F.2d at 929. The holding of *Morast* was limited to the particular facts of that case. *Morast's* holding is not an all out proscription of RICO conspiracy claims grounded on whistle blower injury, especially given the Court's suggestion that its holding might have been different if the complaint had alleged termination as a result of a refusal to participate in the illegal scheme. *Id.* at 933 n.8.

Further, Beck's claim raises several allegations that were not present in *Morast*, including that Beck was fired so that the Defendant Directors "could continue and preserve their racketeering activity," so that he could serve as "a scapegoat," and so that the Defendant Directors could hide their past indiscretions (R5-160 at ¶13). This Court has yet to consider whether these facts are sufficient to confer standing under RICO's conspiracy provision.

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[4] Even if this Court finds that its prior decisions in *Morast* and *O'Malley* do address the issue of whether whistle blowers are barred from asserting a RICO conspiracy claim, we respectfully urge that the Court reconsider this issue based upon the authorities and rationales set forth in subsection (2) of this section of the brief, *infra* at 36-40.

The differences between Beck's conspiracy claim and the claim advanced by the plaintiff in *Morast* provides a sound basis for distinguishing the two cases. The underlying scheme in *Morast* involved a conspiracy, the criminal object of which was a single banking violation. *Morast*, 807 F.2d at 928-29. The plaintiff there alleged that he was discharged afterwards, without justification and purely in retaliation for his reporting the banking violation and cooperating with the subsequent investigation. *Id.* at 929. An overt act, however, is "in furtherance" of a conspiracy only where it "contributes to accomplishing the charged conspiracy's [criminal] goal." *United States v. McKinney*, 954 F.2d 471, 475 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 662 (1992); *see also United States v. Cross*, 928 F.2d 1030, 1042 (11th Cir.), *cert. denied*, 502 U.S. 985 (1991); *United States v. Lignarolo*, 770 F.2d 971, 978 n.9 (11th Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986); *United States v. Pomranz*, 43 F.3d 156, 160 (5th Cir. 1995); *United States v. Wallach*, 935 F.2d 445, 470 (2nd Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2414 (1993); *United States v. Hegwood*, 977 F.2d 492, 497 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2348 (1993). Firing an individual in retaliation for reporting an already completed illegal banking scheme cannot be said to be in furtherance of that scheme – retaliation after the fact in such a situation does not contribute to the underlying criminal purpose of the scheme, which is the banking violation itself. *See, e.g., McKinney*, 954 F.2d at 471. Thus, the plaintiff in *Morast* failed to allege that his firing was in furtherance of the conspiracy.

On the contrary, Beck has alleged and presented evidence that his termination was essential to furthering the

criminal schemes underlying the Defendant Directors' conspiracy, as he was still a threat or impediment to the conspiracy's unlawful objectives. *See supra* at 15-16. Thus, Beck was directly injured by an overt act of the conspiracy.

O'Malley also fails to establish that a whistle blower does not have standing to assert a RICO *conspiracy* claim. In *O'Malley*, a motion was filed seeking dismissal of a complaint containing two separate civil RICO counts: Count I of the complaint alleged a substantive violation under 18 U.S.C. §1962(c); Count II alleged a RICO conspiracy in violation of 18 U.S.C. §1962(d). *Id.* at 1559. Though *O'Malley* did bar claims based upon whistle blower allegations, this holding was expressly limited to the complaint's *substantive* RICO count. *Id.* at 1557. The Court's discussion of the RICO conspiracy count was completely separate from its holding on the issue of standing, dismissing the RICO conspiracy count for a lack of specificity:

> Count II need not detain us long. The district court dismissed Count II – the RICO conspiracy count – because the allegations of a conspiracy were merely conclusory and unsupported by any factual allegations. We find that dismissal to be proper.

Id. at 1560 (citations omitted). As more fully set forth in subsection 2 of this section of the Brief, *infra* at 36-40, this distinction does make a difference. Accordingly, *O'Malley* expressly left undecided the issue of whether a plaintiff had standing to raise a RICO conspiracy count based upon whistle blower injury. This issue remains undecided in this Circuit as of the date of this Appeal.

2. Beck has standing to assert this claim.

a. Law from other circuits.

Although the circuits have split on the issue, *see e.g., Bowman v. Western Auto Supply Co.*, 985 F.2d 383 at 387 (8th Cir. 1993) (noting split of authority), several cases from other jurisdictions have held that a whistle blower has standing to assert a RICO conspiracy claim. *See, e.g., Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3rd Cir. 1989); *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344 (7th Cir. 1992); *Callan v. State Chemical Manufacturing Co.*, 584 F.Supp. 619 (E.D.Pa. 1984); *see also Flinders v. Datasec Corp.*, 742 F.Supp. 929 (E.D.Va. 1990) (injury from overt act, not necessarily a predicate act of racketeering, is sufficient to confer standing if the overt act is wrongful). Respectfully, it is these cases that should guide this Court's ruling in the instant case.

b. The language of the RICO statute.

The courts that have rejected whistle blower standing under §1962(d) have typically based their decision upon the analysis that the whistle blower's injuries did not stem from a predicate act within the purview of §1961(1). *See, e.g., Bowman*, 985 F.2d at 388. However, as pointed out by the Seventh Circuit, this analysis ignores the clear language of the statute:

> [Section] 1964 allows suits by anyone "injured . . . by reason of a violation of §1962." Section 1962(d) prohibits conspiracies, so a person harmed by the conspiracy has been injured "by reason of" a RICO violation. Congress could have written RICO to state that only those injured by reason of predicate acts committed as part of a RICO violation could sue. It did not, and for courts to read §1964 as if that is what Congress wrote would be tantamount to rewriting the statute.

Schiffels, 978 F.2d at 349-50 (citations omitted).

It is axiomatic that the plain words of a statute are controlling as to the statute's meaning and effect. *See, e.g., Sedima*, 473 U.S. at 495 n.13; *Russello v. United States*, 464 U.S. 16, 20 (1983); *United States v. Turkette*, 452 U.S. 576, 580 (1981); *see also Connecticut Dept. of Income v. Heckler*, 471 U.S. 524, 530 (1985) (courts are required to interpret acts of Congress in such a way as to give meaning to each particular word in the text of the statute). The Supreme Court has already applied this maxim to the RICO statute. *See, Sedima*, 473 U.S. at 495 n.13 ("There is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement."). Accordingly, the plain words of the RICO statute support Beck's standing to assert his RICO conspiracy claim.

Moreover, requiring a showing of some form of predicate act injury before permitting recovery under §1962(d) would have the effect of completely nullifying that particular subsection. §1962 has four distinct subsections, and each subsection targets a particular type of criminal conduct. *See Danielsen v. Burnside-Ott Aviation Training Center*, 941 F.2d 1220, 1230 (D.C. Cir. 1991); *Standard Chlorine of Delaware, Inc. v. Sinibaldi*, 821 F.Supp. 232, 245 (D. Del. 1992). §1962(d) makes it unlawful for any person to conspire to violate the provisions of subsections (a), (b), or

(c). 18 U.S.C. §1962(d). On its face, §1962(d) targets conspiracies, *not* predicate acts. Moreover, §1962 already provides a remedy for persons injured by predicate acts. *Sedima*, 473 U.S. at 496-97. If §1962(d) is interpreted as providing a remedy for only damages flowing from the predicate acts themselves, then this subsection becomes superfluous. Such an interpretation would leave no avenue of redress for persons harmed by RICO conspiracies.

Additionally, the Supreme Court has mandated that "RICO is to be read broadly," with a view toward "activity which RICO was designed to deter," and to be "liberally construed to effectuate its remedial purposes." *Sedima*, 473 U.S. at 497-500. Given this edict, "it would be anomalous to allow plaintiffs to recover for harm suffered from investment in, or control or conduct of, a pattern of racketeering, yet preclude recovery for conspiracy to commit these violations simply because the overt act that furthers the conspiracy does not itself qualify as racketeering." *Shearin*, 885 F.2d at 1170.

c. Traditional conspiracy jurisprudence.

Rejection of the predicate act injury requirement is also warranted by traditional concepts of conspiracy law. A conspiracy to violate RICO does not "require anything beyond that required for a conspiracy to violate any other crimes." *United States v. Weissman*, 899 F.2d 1111 (11th Cir. 1990) (citations omitted); *United States v. Napolitan*, 791 F.2d 489 (7th Cir. 1986). The conduct targeted by §1962(d), like that of all laws prohibiting conspiracies, is the *agreement* to violate the substantive provisions of RICO, not the actual substantive violations, themselves. *United*

States v. Angiulo, 847 F.2d 956, 964 (1st Cir. 1988); *Shearin*, 885 F.2d at 1169; *United States v. Phillips*, 665 F.2d 971, 1038 (5th Cir.), *cert. denied*, 457 U.S. 1136 and 459 U.S. 906 (1982); *United States v. Glecier*, 923 F.2d 496, 500 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 54 (1991); *United States v. Brooklier*, 685 F.2d 1208, 1222 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983). Thus, while §1962(d) requires an agreement to commit predicate acts, it does not require that any predicate acts actually be committed. *Shearin*, 885 F.2d at 1169; *Phillips*, 664 F.2d at 1038.

> [S]ince RICO conspiracy does not require the actual commission of a predicate act, it follows that the act causing plaintiffs' injury need not be a predicate act of racketeering. A person directly injured by an overt act in furtherance of a RICO conspiracy has been injured "by reason of" the conspiracy. Since a conspiracy to violate RICO's substantive provisions is itself a violation of RICO, *see* 18 U.S.C. §1962(d), a person injured "by reason of" the conspiracy has been injured "by reason of" the RICO violation. That is all that §1964 requires for standing to bring a civil RICO action.

Schiffels, 978 F.2d at 348-49. A contrary holding also would run contrary to the conspiracy law of this Circuit, which holds that §1962(d) is violated even where there are no predicate acts actually committed. *See, e.g., United States v. Caporale*, 806 F.2d 1487, 1515 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987).

d. Public Policy.

Rejecting a whistle blower, such as Beck, standing to assert a RICO conspiracy claim would "assure employers that when troublesome employees threaten to disclose the commission of RICO violations, those employees can be threatened with termination to keep such violations hidden from public view . . . , ensur[ing] that fewer instances of fraud will be uncovered and that Congress's intent in enacting the RICO statute will be frustrated." *Bowman*, 985 F.2d at 389 (Heany, J., dissenting). There is no appropriate rationale for writing into the RICO statute a requirement that Congress expressly chose not to include.

E. Beck's claim for fraudulent inducement to purchase SIG stock.[5]

Generally, a shareholder may not sue directly for wrongs committed against a corporation that result merely in the diminution of the value of the corporation's shares and that damage the shareholder only derivatively in his capacity as a shareholder. *See, e.g., Stevens v. Lowder*, 643 F.2d 1078, 1080 (5th Cir. 1981). A widely-recognized exception to this principle, however, is that a shareholder may indeed bring suit *directly* if the defendants have violated an independent duty owing to that shareholder. *See, e.g., Chesbrough v. Woodworth*, 244 U.S. 72, 73-74 (U.S. 1917); *Citibank, N.A. v. Data Lease Financial Corp.*, 828 F.2d

[5] The District Court's Order failed to discuss the grounds for its rejection of this particular claim. The District Court limited its analysis to Beck's claim for fraudulent inducement not to sell his stocks, a separate and distinct claim (R6-191).

686, 693-94 (11th Cir. 1987); *Empire Life Ins. Co. v. Valdak Corp.*, 468 F.2d 330, 335 (5th Cir. 1972); *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893, 896 (5th Cir. 1968); *Manson v. Stacescu*, 11 F.3d 1127, 1131-32 (2nd Cir. 1993), *cert. denied*, ___ U.S. ___, 115 S.Ct. 292 (1994); *Ceribelli v. Elghanayan*, 990 F.2d 62, 63-65 (2nd Cir. 1993); *Warren v. Manufacturers Nat'l Bank*, 759 F.2d 542, 544 (6th Cir. 1985); *Stevens*, 643 F.2d at 1080; *Sherman v. British Leyland Motors, Inc.*, 601 F.2d 429, 439-40 (9th Cir. 1979); *Buschman v. Professional Men's Ass'n.*, 405 F.2d 659, 661-63 (7th Cir. 1969).

Under this exception, a shareholder may sue where there exists "a special relationship between the suing shareholder and the defendant, creating a duty, contractual or otherwise, other than that owed to the corporation." *Vincel v. White Motor Corp.*, 521 F.2d 1113, 1118 (2nd Cir. 1975). Thus, where a wrongdoer's actions have resulted in damage to both the corporation and the stockholder, the stockholder may sue *directly* as an individual in cases where the wrong itself amounted to a breach of a duty owed to the individual stockholder, personally. *See Empire Life*, 468 F.2d at 335; *Schaffer*, 397 F.2d at 896; *Borak v. J.I. Case Co.*, 317 F.2d 838, 842 (7th Cir. 1963). Thus, "the same facts which support the existence of a derivative cause of action to redress a wrong to a corporation may also state a direct cause of action by a shareholder for relief from injury caused by a defendant's fraudulent practices." *Small v. Gold*, 637 F.Supp. 1030, 1033 (D.N.J. 1986) (citing *Borak*, 317 F.2d at 844).

The United States Supreme Court decision in *Chesbrough*, a case involving Section 93 of the National

Banking Act, is particularly applicable. There, the defendants were corporate directors who made false and misleading reports concerning the financial condition of their bank. *Id.* at 74. The claim was for fraudulent inducement to purchase stocks – the plaintiff suffered damages because he "purchased stock upon the faith of the action of Defendants." *Id.* The Court found that these fraudulent inducement damages "are personal to the plaintiff," and that "he sues in his own right, not for the [corporation]." *Id.* at 77.

Likewise, in *Empire Life,* the plaintiff loaned the defendant $350,000 and, as collateral for the loan, the defendant pledged 50,000 shares of stock in National Insurance Company ("National"). 468 F.2d at 332. Subsequently, the plaintiff gained control of National. *Id.* At that time, the shares were worth over $1 million. *Id.* The plaintiff sold the shares for $150,000 and sought a deficiency judgment. *Id.* The defendant counterclaimed, alleging that the "plaintiff fraudulently and illegally used its control of National to devalue the corporation in violation of plaintiffs' duty to defendant as pledgee of the collateral." *Id.* The district court dismissed the defendant's counterclaim on the grounds that it was "essentially derivative in nature. . . . " *Id.* at n.2. The Fifth Circuit reversed, holding that the plaintiff's intentional acts of mismanagement, which may have also substantially diminished the value of all of National's stock, violated an independent duty owed to the defendant, injuring the defendant *directly*:

> Here, the defendant seeks damages as a *pledgor*. The fact that his pledge is stock and that if the manipulated depreciation of the stock is proven would also give rise to a derivative suit by defendant as *stockholder* should not foreclose the suit as pledgor. The role of pledgor and stockholder are not identical and defendant may play the part he chooses; when the curtain drops, the facts will invite *finis*.

Id. at 336.

Similarly, when a plaintiff such as Beck alleges that he was fraudulently induced into purchasing stock, the defendants owe him an independent duty as a stock purchaser, separate from the overall duty owed to stockholders in general. This independent duty owed to a stock purchaser has been expressly recognized as a basis for standing to assert a *direct individual claim* under RICO. *See Ceribelli,* 990 F.2d at 63; *see also Pelletier,* 921 F.2d at 1465. This is true "whether or not the corporation may also bring action." *Ceribelli,* 990 F.2d at 63; *see also* American Law Institute, *Principles of Corporate Governance* §7.01(B)-(C). Thus, under the proximate cause standard of *Holmes,* 503 U.S. 258, Beck has standing to assert this claim. *See especially Ceribelli,* 990 F.2d at 65 (applying *Holmes* and holding that "[w]hen misrepresentations induce a buyer to purchase stock, and his losses are a foreseeable consequence of the misrepresentations, [then] the misrepresentations proximately cause the buyer's injuries.").

The fraudulent misrepresentations and omissions regarding Beck's position as SIG's CEO, the Defendant Directors' illegal practices and their fraudulent promises to indemnify contractors induced Beck to purchase the SIG stock. *See supra* at 6-8, 14-15. This fraud practiced upon Beck occurred while Beck occupied the status of a

potential securities purchaser. This separate status gave rise to an independent duty distinct from the duties owed to a SIG stockholder. The breach of this separate and independent duty gives rise to an individual non-derivative cause of action in favor of Beck.

F. Beck's claim for fraudulent inducement to forebear from selling his stock.

Beck, as a director on SIG's board, had a right, separate and independent from the right owed to stockholders in general, to "acquire full information concerning the affairs of the corporation." 18B Am.Jur.2d *Corporations* §1454; *see also Manatee County Growers' Assoc. v. Florida Power & Light Co.*, 152 So. 181, 185 (Fla. 1934); *United Bonding Insurance Co. v. Dura-Stress, Inc.*, 243 So.2d 244, 246 (Fla. 2nd DCA 1971). Beck also had an independent right to the information arising from the business relationship existing between Beck and the Defendant Directors. *See United States v. O'Boyle*, 680 F. 34, 36 (6th Cir. 1982) (business relationship between plaintiff and defendant gave rise to a duty to disclose). A corresponding duty to disclose this information to shareholders in general does not exist: a corporation does not have "an affirmative duty to disclose all material information [where] there is no insider trading, no statute or regulation requiring disclosure, and no inaccurate, incomplete, or misleading prior disclosure." *Id.*; *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 27 (1st Cir. 1987); *Staffin v. Greenberg*, 672 F.2d 1196, 1204 (3rd Cir. 1982); *Schlanger v. Four-Phase Systems, Inc.*, 582 F.Supp. 128, 133 (S.D.N.Y. 1984); Block, Barton & Garfield, *Affirmative Duty to Disclose*

Material Information Concerning Issuer's Financial Condition and Business Plans, 40 Bus.Law. 1243, 1249-50 (1985). Specifically, courts have held that there is no duty on the part of a corporation to disclose to its stockholders illegal conduct perpetrated by the corporation. *See Roeder*, 814 F.2d at 26-28 (corporation did not have general duty to disclose to stockholders that it had paid a bribe to obtain subcontracts).

The Defendant Directors, however, had a duty to disclose their illegal conduct and the other material information to Beck, due to his capacity as their business associate and as a director of SIG. By locking Beck out of the "information loop," and devising an artifice to keep secret their illegal conduct, their plans to terminate Beck and the nature of their dealings with CPC, the Defendant Directors breached two separate independent duties owed to Beck. This directly and fraudulently induced him not to sell his stock in the Enterprise until it was too late. *See* R5-160-EX9 at 53-58; R5-160-EX10 at 273-74.

Accordingly, Beck does have standing to pursue this claim. This standing flows from the fact that Beck seeks redress of harms visited upon him directly, not the general diminution of stock value suffered indirectly by all of SIG's stockholders.

G. Beck's state law claims.

The District Court based its jurisdictional dismissal of Beck's state law claims on 28 U.S.C. §1367(c)(3), which authorizes district courts to decline jurisdiction over pendent state law claims where "the district has dismissed all claims over which [it] has original jurisdiction" (R6-191 at

24). The Court's reliance on section 1367, however, is misplaced.

Section 1367 applies "only to civil actions commenced on or after [Dec. 1, 1990]." Pub.L. 101-650, Title III, §310(c), 104 Stat. at 5113. Beck's pendent state law claims were filed as a cross-claim in New Jersey District Court on May 5, 1990 (R6-191 at 3; R5-160-EX1). Consequently, the District Court applied the wrong law in determining whether to maintain jurisdiction over Beck's pendent state law claims. *See, e.g., Edwards v. Okaloosa County*, 5 F.3d 1431, 1433 (11th Cir. 1993) (common law pendent jurisdiction doctrine, and not supplemental jurisdiction statute, applies to cases commenced prior to §1367's effective date of December 1, 1990); Pub.L. No. 101-650, §310(c), 104 Stat. at 5114.

When analyzed in light of the applicable case law, the District Court's decision to decline to exercise jurisdiction over Beck's state law claims constitutes an abuse of discretion. The United States Supreme Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), made clear that federal jurisdiction to try pendent claims exists even when the federal claim is dismissed before trial. *Id.* at 725-26; *Edwards*, 5 F.3d at 1433. While this decision is committed to the sound discretion of the district courts, such discretion is not unbridled. A district court is required to weigh four factors in reaching its decision on this issue: judicial economy, convenience, fairness and comity. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). None of these factors were considered in the District Court's opinion.

Had the District Court applied the proper criteria, it would have found that dismissal of Beck's state claims was improper. In Florida, actions for fraud and misrepresentation must be filed within four years or they are forever barred by the statute of limitations. Fla.Stat. §95.11(3) (1995); *Sands v. Blando*, 575 So.2d 1306, 1306 (Fla. 3rd DCA 1991). This limitation period has long passed. Whether dismissal of a plaintiffs' state law claims will result in their being time-barred "is certainly a factor, if not the determinative factor, a district court should consider in deciding whether to maintain jurisdiction over pendent state claims once the federal claims have been resolved." *Pharo v. Smith*, 625 F.2d 1226, 1227 (5th Cir. 1980); *see also Garner v. Pearson*, 732 F.2d 850, 854 (11th Cir. 1984); *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corp.*, 711 F.2d 989, 999-1000 (11th Cir. 1989); *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982). In fact, this Court has stated that, where "the statute of limitations [has] run on [a plaintiff's] state claims while the action in federal court was pending, previous decisions of this court strongly indicate that dismissal of the state claims would be an abuse of discretion." *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 420 (11th Cir. 1984), *opinion clarified in part*, 821 F.2d 590 (1987); *see also Edwards*, 5 F.3d at 1434. Thus, as Beck's state law claims would be barred by the applicable statute of limitations, the District Court's Order declining to exercise jurisdiction over these claims should be reversed.

H. Beck's claims against Sparber.

M&S represented Sparber throughout this action. Respectfully, the filing of M&S's Notice of Appearance, Sparber's participation in the case, and the three and one-half year delay before Sparber asserted his service of process defense (especially given that the applicable statute of limitations had run) all mandate reversal of the District Court's dismissal of Beck's claims against Sparber.

1. Sparber was represented by M&S throughout this action.

Agency results where one person (the principal) authorizes another (the agent) to manage some affair for or on behalf of the principal, with the agent wielding more or less discretionary powers in dealings with third persons. *Economic Research Analysts, Inc. v. Brennan*, 232 So.2d 219 (Fla. 4th DCA 1970). The agent is said to step into the shoes of the principal and acts for him pursuant to the grant of authority vested in him by his principal. *King v. Young*, 107 So.2d 751 (Fla. 2nd DCA 1959).

The attorney-client relationship is a form of agent-principal relationship. *See Johnson v. Estate of Fraedrich*, 472 So.2d 1266 (Fla. 1st DCA 1985); *In re Brugh's Estate*, 306 So.2d 599 (Fla. 2nd DCA 1975); *Epperson v. Rupp*, 157 So.2d 537 (Fla. 3rd DCA 1963). The general tenets of agency law are controlling as to the scope of the attorney's authority and whether the attorney's conduct is binding upon the client. *See, e.g., State ex rel. Gutierrez v. Baker*, 276 So.2d 470 (Fla. 1973) (a client is generally

bound by the representations and acts of his attorney when they are within the scope of the attorney's capacity).

It is fundamental that the existence of an agency relationship may be shown by either direct or circumstantial evidence. *McCabe v. Howard*, 281 So.2d 362, 363 (Fla. 2nd DCA 1973). "An agent's authority to act on behalf of the principal may be inferred from acts, conduct, and other circumstances. . . . " *Overseas Private Investment Corp. v. Metropolitan Dade County*, 826 F.Supp. 1564, 1576 (S.D.Fla. 1993), *aff'd in part, rev'd in part on other grounds*, 473 F.3d 1111 (11th Cir. 1995). This inquiry is a question of fact and, even where the alleged principal and agent both deny the existence of an agency relationship, the trier of fact is entitled to infer the existence of such a relationship from the facts and circumstances of the case. *Id.*; *Watkins v. Sims*, 88 So. 764 (Fla. 1921); *Bradley v. Waldrop*, 611 So.2d 31, 32-33 (Fla. 1st DCA 1992); *Singer v. Star*, 510 So.2d 637, 640 (Fla. 3rd DCA 1987); *McCabe*, 281 So.2d at 363.

Therefore, the affidavits of Sparber and M&S (R2-64-EX A; R2-64-EX B), denying the existence of an attorney-client relationship, are not dispositive of this issue. The assertions raised in the affidavits, that the Notice of Appearance was filed solely due to clerical error and that no attorney-client relationship existed between Sparber and M&S with regard to this particular action, cannot be accepted solely on their face, given the substantial circumstantial evidence that such a relationship did, in fact, exist. At minimum, a question of fact remains. Perhaps most telling is the fact that it is M&S, ostensibly not previously representing Sparber in this matter, who filed

Sparber's Motion to Dismiss and who is now representing Sparber in this matter (R2-64).

The District Court failed to undertake the factual analysis as to whether these facts reveal that M&S did represent Sparber since early in this action. Instead of analyzing the underlying circumstances to determine whether M&S was acting as Sparber's agent, the District Court made only the following statement:

> While Sparber's attorney participated in depositions in this case, he represents in the motion that he participated as counsel for Littenberg, not Sparber. Beck does not dispute this assertion in his response.

(R6-168-14).

Beck, however, did dispute this assertion, arguing that the circumstantial evidence contradicted Sparber's and M&S's denial that M&S participated in the depositions on Sparber's behalf and otherwise represented Sparber in this matter (R2-79 at 5-6, 13-14). The crux of Beck's argument was actually that, Sparber and M&S's denials notwithstanding, the surrounding circumstances indicate that M&S was participating on behalf of Sparber, as well as Littenberg, during the extensive pretrial phase of this action. A factual determination must be made as to whether the circumstantial evidence presented was sufficient to establish that M&S was Sparber's agent throughout the course of this action.

2. Sparber waived his service defense.

The District Court's failure to evaluate the evidence of agency was critical. By not making that initial agency determination, the District Court was unable to properly evaluate Beck's contention that Sparber had substantially participated in this action prior to raising his service of process defense, thus waiving that defense.

Lack of personal jurisdiction is not a defense of right but rather a defense that can be waived by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165, 168 (1939); *Federal Home Loan Mortgage v. Dutch Lane Associates*, 775 F. Supp. 133, 136 (S.D.N.Y. 1991). Service of process upon a party is not an absolute prerequisite to personal jurisdiction. Fed.R.Civ.P. 12. Under the Rule, *any* jurisdictional defect stemming from insufficiency of process is waived unless it is raised in an answer or by motion to dismiss. *See also Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1298 (5th Cir. 1985). Rule 12(h), however, "sets only the outer limits of waiver; it does not preclude waiver by implication." *Kearns v. Ferrari*, 752 F.Supp. 749, 751 (E.D. Mich. 1990); *Marquest Medical Products, Inc. v. EMDE Corp.*, 496 F.Supp. 1242 (D.Col. 1980). Thus, a party need not actually file an answer or motion before waiver is found. *Trustees of Central Laborers' Wefare Fund v. Lowery*, 924 F.2d 731, 732 (7th Cir. 1991); *Broadcast Music, Inc. v. M.T.S. Enterprises, Inc.*, 811 F.2d 278, 281 (5th Cir. 1987); *Heleasco Seventeen, Inc. v. Drake*, 102 F.R.D. 909, 912 (D. Del. 1984). Waiver may arise "by implication from a defendant's seeking, taking, or agreeing to some step or proceeding in the

cause beneficial to himself or detrimental to plaintiff other than contesting jurisdiction. . . . " *Cactus Pipe & Supply v. M/V Montnatre*, 756 F.2d 1103, 1108 (5th Cir. 1985).

Where a defendant leads a plaintiff to believe that service of process is adequate and that no defense as to service would be interposed, courts have not hesitated to conclude that the defense is waived. *Lowery*, 924 F.2d at 733; *see also Broadcast Music, Inc.*, 811 F.2d at 281; *Norlock v. City of Garland*, 768 F.2d 654, 657 (5th Cir. 1985); *R. Clinton Construction Co. v. Bryant & Reaves, Inc.*, 442 F.Supp. 838, 848-49 (N.D. Miss. 1977). Even if a general appearance by a defendant does not constitute a waiver of the defense of lack of personal jurisdiction, if a defendant does appear, subsequent contest of the court's jurisdiction over the person must be timely. *Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994, 997 (1st Cir. 1983); *Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc.*, 376 F.2d 543 (3rd Cir. 1967); *Kearns*, 752 F.Supp. at 752; *Marquest Medical Products*, 496 F.Supp. at 1244; *Emerson v. National Cylinder Gas Co.*, 131 F.Supp. 299 (D.Mass 1955); 5 Wright and Miller, Federal Practice and Procedure, §1344, at 525, 526. Otherwise, the defendant is guilty of the equivalent of laches. *Marcial Ucin*, 723 at 997; *Kearns*, 752 F.Supp. at 752; *Vozeh v. Good Samaritan Hospital*, 84 F.R.D. 143 (S.D.N.Y. 1979). A defendant with an objection to service must move at the earliest possible opportunity to dismiss the complaint, before expiration of the statute of limitations. *Burton v. Northern Dutchess Hospital*, 106 F.R.D. 477, 481 (S.D.N.Y. 1985). If Sparber was indeed participating in this action, as the circumstantial evidence suggests, then he sat on his service challenge for more than three and one-half years

after M&S entered an appearance on his behalf.[6] He cannot now be heard to complain that service was never perfected upon him.

The facts presented by this case parallel those in *Kearns*. In *Kearns*, the defendants, who had made a general appearance through counsel but did not file a responsive pleading prior to their motion to dismiss for improper service, waited four years before raising their challenge to service. 752 F.Supp. at 751-52. The court found that defendants had waived their service defense, holding that "[f]our years is simply too long a period for defendants to wait. . . . " *Id.* at 752-53. Similarly, Sparber, who appeared through counsel over three and one-half years ago, simply waited too long to raise his Rule 4(j) motion. "[B]oth [Beck] and the Court would have been justified, had they given any thought to it, in thinking that [Sparber] had accepted service and acquiesced to personal jurisdiction." *Id.* at 752.

Similarly, in *Marcial Ucin*, the First Circuit rejected the argument that "the privilege of lack of personal jurisdiction may be retained by an appearing defendant for as long as he does not file a pre-answer motion or responsive pleading. . . . " 723 F.2d at 997. There, the court found that the defendant had waived its service defense, holding that, upon appearing, a defendant must timely contest the court's lack of personal jurisdiction – four years later was too long. *Id.*

---

[6] Sparber could have filed his Rule 4(j) motion as early as September 3, 1990, 120 days after Beck filed his Cross-Claim on May 5, 1990.

In reaching its decision, the court in *Marcial Ucin* also considered that the defendant's delay had exposed the plaintiff to a possible statute of limitations bar. *Id.* Sparber's dilatory conduct in this case has exposed Beck to similar danger. *See also Santos v. State Farm Fire & Casualty Co.*, 902 F.2d 1092 (2nd Cir. 1990) (defendant waived its insufficiency of service defense by waiting two years to raise it, well after the limitations period on plaintiffs' claims had expired); *Benviste v. Eiseman*, 119 F.R.D. 628 (S.D.N.Y. 1988) (medical malpractice defendant waived defense of insufficient service of process where it delayed almost three years in asserting defense and dismissal would result in plaintiffs' claim being barred by the statute of limitations); *Vozeh*, 84 F.R.D. 143 (defendant's silence for almost two years waives service defense, especially where plaintiff faces a statute of limitations bar as a result thereof); *Burton*, 106 F.R.D. 477 (three and one-half year delay constitutes a waiver).

Moreover, Sparber also waived his service of process objection by taking steps and participating in proceedings in this case beneficial to him, constituting waiver by implication. M&S's Notice of Appearance on behalf of Sparber requests that all parties forward pleadings and other pertinent forms of correspondence to M&S (R1-4). Sparber has thereby kept intimately in touch with the litigation. Sparber also participated in discovery.[7] This conduct clearly benefitted Sparber, as he is now as prepared to participate in the trial of this matter as any other defendant. This is the very type of conduct which should

[7] M&S has participated in each and every discovery event in this case to date, including virtually all of the depositions.

constitute a waiver of an insufficiency of service defense. *See also Datskow v. Teledyne, Inc.*, 899 F.2d 1298 (participating in discovery); *Broadcast Music, Inc.*, 811 F.2d 278 (attendance at pretrial conference).

VI. CONCLUSION

It is respectfully submitted that the District Court's entry of summary judgment on Beck's RICO claims, its dismissal of Beck's state law claims and its dismissal of Beck's claims against Sparber should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail on this 26th day of December, 1995 to all counsel on the attached service list.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 95-4844

ROBERT A. BECK, II,

Plaintiff-Appellant,

vs.

RONALD M. PRUPIS, LEONARD BELLEZZA, ERNEST J. SABATO, WILLIAM PAULUS, JR., HARRY OLSTEIN, FREDERICK C. MEZEY, BYRON L. SPARBER, JOSEPH S. LITTENBERG,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLEES, LEONARD BELLEZZA, ERNEST J. SABATO, WILLIAM PAULUS, JR., AND HARRY OLSTEIN

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STATEMENT REGARDING ORAL ARGUMENT

Because of the size of the record and because plaintiff is arguing for a modification or reversal of Eleventh Circuit RICO precedent, defendants Leonard Bellezza, William Paulus, Harry Olstein and Ernest J. Sabato request oral argument.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed in a manner that is not proportionally spaced. See 11th Cir. R. 32(b). The type size is 12-point and 10-pitch. The type style is courier.

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I. STATEMENT OF JURISDICTION

This is an appeal from an order entering summary judgment in favor of defendants. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES

1. Was the district court correct in holding that plaintiff lacked RICO standing to assert claims as a shareholder, creditor, guarantor and employee of Southeastern Insurance Group, Inc.?

2. Even if plaintiff had RICO standing, were defendants entitled to summary judgment because plaintiff was not injured by a "pattern of racketeering activity"?

3. Did the district court abuse its discretion by declining to exercise supplemental jurisdiction over plaintiff's pendent state law claims?

III. STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from an order entering summary judgment in favor of defendants Leonard Bellezza, William Paulus, Ernest J. Sabato, Jr., and Harry Olstein ("the Bellezza Group"). The district court held that plaintiff Robert A. Beck, II ("Beck") lacked standing to maintain his RICO suit against them. The court also declined to exercise supplemental jurisdiction over Beck's pendent state law claims. R6-191.

B. Course of the Proceedings and Disposition Below.

Beck is a former shareholder, officer and director of Southeastern Insurance Group, Inc. ("SIG"). This suit is the latest in a long line of suits involving the same series of alleged wrongful actions committed by SIG's former officers and directors, including the Bellezza Group.

This litigation began on May 15, 1989, when Beck filed an action in Florida state court against the Bellezza Group and other SIG principals, alleging violations of Florida's RICO statute and Florida common law ("the Florida state action"). R5-138-Exh.E. Beck alleged that defendants had committed substantive and conspiracy RICO violations by terminating him in retaliation for his blowing the whistle, or threatening to blow the whistle, on defendants, who he alleged had engaged in a pattern of racketeering activity against numerous third parties. R5-138-Exh.E, Counts I-IV.

In August 1989, soon after Beck filed the Florida state action, SIG shareholders filed a derivative action in federal district court in New Jersey under the federal RICO statute ("the Shareholders' Derivative action"). R5-138-Exh.F. While SIG was the nominal defendant, the principal defendants were Beck and all of SIG's officers and directors, including the Bellezza Group. The shareholders alleged the same pattern of racketeering activity that Beck alleged in the Florida state action, but they alleged derivative injury for the lost value of their investments. R5-138-Exh.F, ¶¶73-75, 106-16.

On November 28, 1989, the Florida state court dismissed Beck's substantive RICO claims, holding that he lacked RICO standing to sue as a terminated whistleblower. R5-138-Exh.H. Beck then voluntarily withdrew his RICO conspiracy claim and Florida state claims. R5-138-Exh.J.

SIG declared bankruptcy in January 1990, at which point the Shareholders' Derivative action was taken over by SIG's bankruptcy trustee, Jules Bagdan. R5-138-Exh.G. In May 1990, Beck reasserted his dismissed RICO claims as a crossclaim in the Shareholders' Derivative action, recasting them as purported violations of federal RICO rather than Florida RICO. He also reasserted his Florida common law claims. R5-138-Exh.A. Beck brought this action in New Jersey even though his employment agreement contained a Florida forum-selection clause. R5-138-Exh.A, Exh.A ¶14.1. This was an apparent attempt to forum-shop, since the Eleventh Circuit had held that whistleblowers lack standing to assert RICO conspiracy claims while the Third Circuit had reached the opposite conclusion. *Compare Morast v. Lance*, 807 F.2d 926, 933

(11th Cir. 1987) *and O'Malley v. O'Neill*, 887 F.2d 1557, 1561-62 (11th Cir. 1989) *with Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1169 (3d Cir. 1989).

Beck's federal RICO crossclaim alleged 50 predicate acts, consisting of the same series of events and the same alleged pattern of racketeering activity as were alleged in his dismissed Florida action and in the Shareholders Derivative action. *See* R5-138-Exh.A, ¶¶79-128; R5-138-Exh.E, ¶¶55-79. In his crossclaim, Beck again alleged that the Bellezza Group and other directors conducted SIG's affairs through a pattern of racketeering activity, and he claimed damages stemming from his alleged status as a terminated whistleblower. R5-138-Exh.A, ¶¶5, 11-41, 79-128. In addition, Beck alleged, as RICO injuries, damages stemming from his status as a SIG creditor and guarantor. R5-138-Exh.A, ¶¶43-78. On March 5, 1991, the New Jersey district court transferred Beck's crossclaim to the Southern District of Florida pursuant to the forum-selection clause. R5-138-Exh.L at 12-30.

During the same time period, the Florida and New Jersey Departments of Insurance placed SIG's three operating insurance subsidiaries into receivership and then sued SIG's principals – including the Bellezza Group – for mismanagement and looting. R5-138-Exhs. M-O. These three receivers' lawsuits alleged wrongful acts similar to those Beck alleged in his Florida state action and in his federal crossclaim. The receivers' lawsuits sought to recover damages for the benefit of the creditors and shareholders of the insolvent insurance subsidiaries. *Id.* In May 1993 the Bellezza Group and other SIG directors paid a substantial settlement to the Florida receiver on

behalf of two of the subsidiaries; Beck, as a SIG shareholder and creditor, is a beneficiary of that recovery. R5-138-Exh.P.

In April 1994, three years after the transfer of his crossclaim to the Southern District of Florida, Beck filed his Response to RICO Case Standing Order ("RICO Case Statement"), asserting that the 50 alleged predicate acts of mail fraud, wire fraud and extortion caused him to sustain direct injury – even though those acts were committed against SIG and other third parties. R5-138-Exh.B, ¶5. In addition, Beck asserted that he lost the value of $828,234 in stock because of SIG's bankruptcy. R5-138-Exh.B, ¶¶4.a.iv, 17.

On March 30, 1995, the Bellezza Group moved for summary judgment on the grounds that Beck lacked RICO standing to sue as a creditor, shareholder, guarantor and terminated whistleblower, that Beck could not prove a pattern of racketeering activity, and that Beck's claims were barred by res judicata and collateral estoppel. R5-136; R5-164 at 5, 9 n.7; R6-178; R6-179.

On June 7, 1995, the district court granted defendants' summary judgment motion, rejecting defendants' preclusion arguments (R6-191 at 4-10) but holding that Beck's injuries were not proximately caused by defendants' alleged misconduct and that he therefore lacked RICO standing. R6-191 at 10-24. The district court declined to reach the "pattern" issue. R6-191 at 11. The court declined to exercise supplemental jurisdiction over Beck's state law claims. R6-191 at 24. Beck filed his notice of appeal on July 5, 1995. R7-193.

On July 7, 1995, the Bellezza Group moved for sanctions pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927, and also moved for costs. R7-196; R7-194. On November 21, 1995, the court denied the motion for sanctions without making any factual findings and granted in part and denied in part the motion for costs. R7-223. On December 21, 1995, the Bellezza Group filed an appeal of the November 21 order. R7-224. The parties have filed a joint motion to consolidate the appeals, but no order has yet been entered.

C. Statement of Facts.

SIG was a Florida-based insurance holding company. R5-138

Exh.B., ¶¶2, 4.a. From 1983, when SIG was founded, until it declared bankruptcy in January 1990, SIG owned three operating insurance subsidiaries: Southeastern Casualty & Indemnity Insurance Co., Inc. ("SCI-Fla"); Southeastern Casualty & Indemnity Insurance Company of New Jersey, Inc. ("SCI-NJ"); and Southeastern Reinsurance Company, Inc. ("SRC") (collectively, "the Insurance Subsidiaries"). The Insurance Subsidiaries wrote surety bonds for construction contractors. R5-138-Exh.A, ¶7.

Beck was SIG's president from 1983 to May 1988, when he was terminated upon the advice of Firemark Consultants, Inc., an insurance consulting firm. Firemark had conducted an extensive review of SIG and, in a detailed report, made numerous recommendations regarding SIG's operations. One of those recommendations was the termination of several SIG officers – Beck,

Ronald Prupis and Linda Burton – for substandard management practices. R6-191 at 1; R5-138-Exh.C.

Beck's RICO Allegations

In his crossclaim and RICO Case Statement, Beck delineated 50 RICO predicate acts allegedly committed by defendants, not against Beck himself but against third parties. R5-138-Exh.A, ¶¶79-128; Exh.B, ¶5. Specifically, Beck alleged the following:

> • Numerous acts of "extortion" and mail/wire fraud committed *against contractors* seeking bonds, who were required to pay allegedly unlawful fees to Contractors Performance Corporation ("CPC"), a SIG subsidiary, as a condition of obtaining the bonds. R5-138-Exh.A, ¶¶23-30, 79-128.
>
> • Various acts of "looting" *of SIG's Insurance Subsidiaries*, R5-138-Exh.A, ¶¶31-41, 95-96, 112-13.
>
> • Three acts of mail/wire fraud committed *against First Fidelity Bank*, which loaned $7.5 million to SIG in December 1987 in reliance on allegedly inflated financial projections. R5-138-Exh.A, ¶¶108-09, 111; R5-138-Exh.B, ¶5.[1]

[1] The remaining predicate acts were five alleged phone calls supposedly related to Beck's termination as president in May 1988. R5-138-Exh. A, ¶¶119-23. But since employment termination is not criminal, these phone calls cannot be considered predicate acts.

Thus, all of the alleged predicate acts were directed at third parties. Nevertheless, in his RICO Case Statement, Beck claimed that he was directly injured by these predicate acts. Beck asserted: "By looting SIG and engaging in their illegal conduct, the Defendants caused the value of Beck's stock to greatly depreciate." R5-138-Exh.B, ¶4.a.iv. Similarly, in response to the question, "Describe the *direct causal relationship* between the alleged injury and the violation of the RICO statute, Beck stated, in part: "The defendants' continued violations of the RICO statute *resulted in the failure of SIG*, causing substantial losses to Beck." R5-138-Exh.B, ¶16 (emphasis added). Beck additionally alleged that he suffered the following damages:

(1) *Injury as a creditor.* Beck alleged that he was fraudulently induced to extend an unsecured $150,000 loan when he purchased SIG debentures in August 1986 and that he lost the value of that loan when SIG went bankrupt.

(2) *Injury as a shareholder.* Beck alleged that he was fraudulently induced to purchase $75,000 of stock in August 1986 (along with the debentures), that he was fraudulently induced to forebear from selling $828,234 in stock during 1987, and that he lost the value of all of his stock when SIG went bankrupt.

(3) *Injury as a guarantor/creditor.* Beck alleged that he was fraudulently induced to guarantee a $7.5 million loan that First Fidelity Bank made to SIG in December 1987, and that SIG's bankruptcy caused SIG to default on that loan and to trigger Beck's Guaranty.

(4) *Injury as a terminated whistleblower.* Beck alleged that defendants created false causes for his termination as president in May 1988 in order to prevent him from blowing the whistle on their alleged illegal conduct, allegedly causing him to lose $1,368,741.

R5-138-Exh.B, ¶¶4.a., 16-17.

As discussed below, Beck's own deposition revealed that all of these alleged injuries occurred derivatively – i.e., as an indirect result of SIG's demise, not because of any direct fraud against Beck.

Beck's Indirect Injuries Involving the Stock and Loan

In his deposition, Beck admitted that the losses of his $150,000 loan and $828,234 in stock occurred because SIG went bankrupt, and that SIG's bankruptcy resulted from the RICO predicate acts allegedly practiced upon third parties. Beck repeatedly conceded that the targets and direct victims of the alleged RICO predicate acts were as follows: the Insurance Subsidiaries and SIG, whose value declined to the point of bankruptcy; First Fidelity, which issued the $7.5 million loan based on allegedly inflated financial projections; contractors that were supposedly extorted; and bond claimants who could not recover on the bonds because the Insurance Subsidiaries' reserves were depleted. Beck admitted that shareholders and creditors, who lost the value of their investments/loans when SIG went bankrupt, were only derivatively injured. R5-138-Exh.Q (Vol. VIII at 86-88, 123-29, 137-38; Vol. V at 228-38).

For example, Beck explained the reasoning behind his allegation that the contractors had been victimized by "extortion." He testified that CPC, a SIG subsidiary, charged the contractors a fee for monitoring their performance on construction jobs to prevent a default that would trigger the Insurance Subsidiaries' bond obligation. Beck testified that the contractors were "extorted" because SIG supposedly conditioned issuance of the bond on the contractor's payment of the CPC fee, which Beck believed was an illegally-disguised insurance premium. Beck's theory was that, because SIG charged these additional fees, it was more willing to issue high-risk bonds to poor-quality contractors. Beck testified that this created a cash-flow mentality, with SIG issuing high-risk bonds by demanding illegal fees from contractors, thus generating premiums without regard for possible future claims. R5-138-Exh.S.

But, most importantly, Beck also testified that the injury from these activities was suffered directly only by SIG, its Insurance Subsidiaries and the contractors who paid the monitoring fees. He conceded that the Insurance Subsidiaries suffered the primary injury, because the "high risk bonds" resulted in too many claims against them, thereby depleting their assets. He also conceded that SIG suffered a secondary injury, because the value of its holdings declined when the Subsidiaries became insolvent. Finally, Beck admitted that shareholders and debenture holders – such as himself – suffered only a tertiary injury, because their investment became worthless only when SIG's value declined, which in turn occurred because the Insurance Subsidiaries became insolvent. R5-138-Exh.T.

Additionally, Beck admitted that the "looting" of the Insurance Subsidiaries caused direct injury only to SIG and the Insurance Subsidiaries. He testified that the Insurance Subsidiaries were hurt directly because their "policyholders surplus and unearned premium reserves" were depleted, which rendered them unable to pay debts and insurance claims. Beck further admitted that SIG was hurt directly because the value of its wholly-owned subsidiaries was destroyed. And he conceded that he and all the other stockholders and debenture holders were hurt only indirectly or derivatively, because the Insurance Subsidiaries became insolvent, thus diminishing the value of the stock and debentures. R5-138-Exh.R.

In sum, Beck conceded that he and all the other shareholders and debenture holders lost the value of their investments when "SIG went out of business" because of the alleged RICO predicate acts directed at the Insurance Subsidiaries, SIG and contractors. *See also* R5-138-Exh. U at 138; Exh. V at 132-55.

Beck's Indirect Injury Involving the Guaranty

Beck alleged that defendants' conduct caused him to incur damages from signing a Guaranty of the $7.5 million loan from First Fidelity Bank to SIG. R5-138-Exh.A, ¶¶61-73; R5-138-Exh.B, ¶2.a.vi. However, as is explained below, Beck never paid any money on the Guaranty, and he admitted that he had full knowledge of SIG's financial condition when he signed the Guaranty.

On December 30, 1987, First Fidelity loaned $7.5 million to SIG and required all 10 senior officers and directors – including Beck and the Bellezza Group – to sign a

personal guaranty. R5-138-Exh.A and Exh. D thereto; R6-165-Exh.C. SIG defaulted on the loan more than a year later. On November 8, 1989, First Fidelity filed suit in New Jersey against SIG and the guarantors to recover the $3.3 million outstanding balance. R5-138-Exh.W. Beck defended the action and filed a third-party complaint against Lampf, Lipkind, Prupis & Petigrow ("L2P2") – SIG's legal counsel – for malpractice; he claimed that the law firm negligently advised him as to his liability on the Guaranty. R5-138-Exh.W, ¶5.

On June 29, 1990, the New Jersey court entered judgment against the guarantors for the $3.3 million balance. R5-138-Exh.X at 2. Beck paid no money pursuant to this judgment, however. Rather, the Bellezza Group paid and took an assignment of the judgment and then asserted claims against L2P2 for malpractice for advising the directors to sign the Guaranty. The Bellezza Group recovered a substantial sum from L2P2 in a settlement, thereby extinguishing the First Fidelity judgment. R5-138-Exhs.Y & Z.

Although Beck never paid a cent on the Guaranty, he continued to prosecute his third-party complaint against L2P2, seeking to recover the attorneys' fees he claimed to have incurred in defense of the First Fidelity action. Beck and L2P2 settled, with Beck receiving $425,000. R5-138-Exh.1. The only RICO damage Beck alleges here with respect to the Guaranty is the amount of attorneys' fees incurred against First Fidelity but not recouped from L2P2. R5-159 at 7.

In opposing defendants' summary judgment motion, Beck failed to submit any affidavit revealing what that

uncompensated amount of attorneys' fees was. All he presented was an unsupported, unsworn statement contained in a footnote of his opposition brief, which asserted that his "total attorneys' fees in defending that [First Fidelity] case exceed $800,000." R5-159 at 10 n.8. That astronomical amount of attorneys' fees, for an uncomplicated guaranty action, is difficult to believe. In any event, the amount of Beck's legal fees is irrelevant because, as shown in the Argument, those fees are not compensable as RICO damages.

Beck's Change of Position

As noted above, Beck's crossclaim and RICO Case Statement alleged that Beck was *directly* injured by 50 predicate acts that were directed against third parties. R5-138-Exh.B, ¶¶4.a.iv., 16. Beck thus forced defendants to engage in protracted and expensive discovery to refute those 50 acts. R7-196 at 2-3; R5-138-Exhs. D, Q-V, 3-10, 12-18. But when faced with his own damaging deposition testimony – and legal precedent holding that shareholders, creditors and whistleblowers lack RICO standing – Beck recanted his original contention that the 50 pleaded predicate acts caused him direct RICO injury. He did not do so, however, until he opposed the Bellezza Group's summary judgment motion, when he conceded: "Beck does *not* seek any damages resulting from *those* predicate acts. They are plead in the instant case merely to satisfy RICO's pattern requirement." R5-163 at 5 (emphasis by Beck). In short, it took Beck six years to abandon his claim that he was directly injured by the predicate acts that had targeted third parties.

Accordingly, in his summary judgment opposition, Beck refocused his case and argued solely that he was directly damaged by separate acts of alleged fraudulent misrepresentation. Specifically, Beck asserted (i) that he was defrauded when he extended the $150,000 loan and purchased $75,000 in stock, transactions that occurred when Beck purchased a SIG stock/debenture "unit" in an August 1986 private offering; (ii) that he was fraudulently induced to sign the First Fidelity Guaranty; (iii) that he forbore from selling his $828,234 of stock because of defendants' alleged concealment of their alleged illegal activities and of SIG's financial condition, a claim Beck did not plead; and (iv) that defendants created fraudulent causes for his May 1988 employment termination. R5-163 at 5-18.

Beck's pleadings were devoid of any predicate acts committed in connection with these alleged frauds. The only predicate acts he identified were the acts of "extortion" and alleged mail/wire fraud committed against third parties, which he had admitted did not cause him any direct injury. R5-138-Exh.A, ¶¶79-128; Exh.B, ¶5; R5-163 at 5. Beck asserted conclusorily that the alleged frauds committed against him constituted RICO predicate acts, but he failed to plead any use of the mails or wires in connection with those alleged fraudulent acts. R5-138-Exh.A, ¶¶42-78.

The Lack of Factual Support for Beck's Fraud Claims

Beck's fraud allegations were groundless, as the district court found. R6-191 at 16. Both in the district court and here on appeal, Beck has constructed a house of cards

based on distortions of cited factual exhibits, on factual statements that have no support in the record, and on the mere unsubstantiated allegations of his pleadings.

For example, as discussed in the Argument in greater detail, Beck's allegation that he was fraudulently induced to purchase the stock/debenture unit in August 1986 had no support in the record. He alleged that defendants promised to maintain him as CEO and that he would not have purchased the SIG unit had he known they were going to remove him as CEO. R5-163 at 7-8. But as the district court found, this allegation was a "bald assertion" unsupported by any record evidence. R6-191 at 16.

Beck's allegation that he was fraudulently induced to sign the First Fidelity Guaranty similarly lacked foundation. In his pleadings and summary judgment opposition, Beck alleged that he signed the Guaranty in reliance on an allegedly inflated estimate of SIG's projected financial performance. R5-138-Exh.A, ¶¶61-73; Exh.B, ¶2.a.vi; R5-163 at 9. In his deposition, however, Beck conceded that he did not receive the financial projection before signing the Guaranty; thus, he could not possibly have relied upon it. R5-138-Exh.15.

Beck also alleged that he would not have signed the Guaranty if defendants had not "concealed" allegedly illegal transactions with a contractor called Chief Structures. That alleged concealment supposedly inflated SIG's, financial condition. R5-138-Exh.A, ¶¶19, 61-73; R5-163 at 9-13. Beck alleged that defendants caused SIG to advance substantial sums of money to Chief because Chief was having difficulty completing its construction projects. He further alleged that these advances should

have been considered "claims" or "losses" on SIG's financial statements but that defendants treated them as "assets" or "notes receivable," thus inflating SIG's value. R5-138-Exh.A, ¶19. Beck alleged that he signed the Guaranty in reliance on financial records that made no mention of the Chief transactions. R5-138-Exh.A, ¶¶61-73. At his deposition, however, Beck admitted that he had full knowledge of the Chief transactions and of SIG's finances when he signed the Guaranty. R5-138-Exhs.3-12. *See infra* at 32-35.

D. Statement of the Standards of Review

This Court uses a plenary standard of review on an appeal from the entry of summary judgment. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991). With respect to the refusal to exercise jurisdiction over the pendent state law claims, the issue is whether the district court abused its discretion. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

IV. SUMMARY OF THE ARGUMENT

The district court was correct in entering summary judgment in favor of the Bellezza Group. Under controlling decisions of the Supreme Court and Eleventh Circuit, Beck lacked standing to assert RICO claims in his capacity as a creditor, shareholder, guarantor and employee. The injuries Beck sustained were derivative, resulting from the general demise of SIG, not from any predicate acts targeted directly at him since there was no factual foundation for Beck's fraud allegations. Moreover, Beck's

loss of employment was caused by the non-criminal decision to terminate him, not by any RICO predicate act.

Nor could Beck prove that he was injured by a "pattern of racketeering activity." The predicate acts alleged were, as Beck himself admitted, directed against third parties, not against him. Those predicate acts were wholly unrelated to the frauds allegedly directed at Beck.

Finally, the district court was well within its discretion in declining to exercise jurisdiction over Beck's pendent claims. Beck cannot complain that his state law claims are barred by the statute of limitations when it was he who voluntarily dismissed those claims from the prior Florida lawsuit in order to raise them in this baseless federal RICO suit.

V. ARGUMENT

POINT I

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT BECK LACKED RICO STANDING.

In holding that Beck lacked RICO standing, the district court noted that "RICO does not provide a remedy for every injury that may be traced to predicate acts." R6-191 at 12. The court explained that, despite the apparently broad language of 18 U.S.C. § 1964(c) – RICO's civil damage provision – plaintiffs must prove that their injuries were directly and proximately caused by predicate acts of racketeering. R6-191 at 12-13. The courts' analysis and conclusion were correct.

A. To Have RICO Standing, a Plaintiff Must Surmount Two Important Standing Limitations.

The district court held that, to have RICO standing, a plaintiff must prove that § 1962 was violated and that, under § 1964(c), the plaintiff was "injured in his business or property by reason of" the RICO violation. R6-191 at 10, *citing Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir. 1994); *O'Malley v. O'Neill*, 887 F.2d 1557, 1561 (11th Cir. 1989). The district court recognized that "in the 11th Circuit, a plaintiff has standing to sue under section 1964(c) only if his injury flowed directly from the commission of the predicate acts." R6-191 at 12, *citing Pelletier v. Zweifel*, 921 F.2d 1465, 1497, 1499 (11th Cir. 1991). This rule embodies two important limitations on RICO standing.

First, a RICO plaintiff must show that his "injury flowed from a particular predicate act." *Pelletier*, 921 F.2d at 1497. As the Supreme Court has held, plaintiff's injury must result from the criminal racketeering activity "which RICO was designed to deter," and not from mere tortious "other conduct." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985). *See also Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 31 (1st Cir. 1987) (RICO not intended to target "ordinary commercial fraud").

Second, defendants' predicate acts must be the "proximate" cause, and not merely the "but for" cause, of plaintiff's injury. R6-191 at 12, *citing Holmes v. Security Inv. Prot. Corp.*, 112 S. Ct. 1311, 1317-18 (1992). This proximate cause requirement demands "some *direct relation* between the injury asserted and the injurious conduct

alleged," and precludes recovery by a plaintiff who complains of harm "flowing merely from the *misfortunes visited upon a third person by the defendant's acts.*" *Holmes*, 112 S. Ct. at 1318 (emphasis added); R6-191 at 12, *quoting Pelletier*, 921 F.2d at 1499 (plaintiff does not have standing for damages "caused indirectly by the predicate act"). This proximate cause requirement means that where, as here, the plaintiff alleges mail or wire fraud, he must prove that he was " 'the target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme.' " R6-191 at 13, *quoting Pelletier*, 921 F.2d at 1499-1500; *O'Malley*, 887 F.2d at 1561, 1563 & n.9.

In *Holmes*, the Supreme Court reasoned that a suit by an indirectly injured plaintiff is inappropriate for three reasons: such a suit makes it impossible to determine whether plaintiff's injury was caused by a RICO violation or by some independent cause; such a suit makes it difficult for courts to apportion damages among victims removed at different levels of injury from the violation; and, in any event, such a suit is not necessary because the directly injured victim can usually be counted on to vindicate the law as a private attorney general. 112 S. Ct. at 1318. Thus, "[t]he proximate cause requirement serves the interests of judicial economy by allowing courts to determine in a derivative action one damage award that will restore the corporation and, therefore, its shareholders, creditors, and employees." *Manson v. Stacescu*, 11 F.3d 1127, 1132 (2d Cir. 1993).

B. Beck's Shareholder/Creditor Claims Are Derivative.

These RICO standing limitations have been applied in a variety of contexts, including the shareholder/creditor context. Here, Beck alleges that defendants' conduct caused him to lose the value of an unsecured $150,000 loan and of $75,000 of SIG stock. As the district court noted, both of those transactions occurred when Beck purchased a $225,000 stock/debenture unit in an August 1986 private offering. R6-191 at 16; R5-161-Exh.12 at 5.

The Circuit Courts are unanimous in holding that a shareholder or creditor who loses the value of his investment or loan because of RICO predicate acts visited upon the corporation lacks RICO standing. *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 29 (1st Cir. 1987); *Manson v. Stacescu*, 11 F. 3d 1127, 1131 (2d Cir. 1993); *In re Sunrise Sec. Litig.*, 916 F.2d 874, 883, 888-89 (3d Cir. 1990); *Warren v. Manufacturers Nat. Bk. of Detroit*, 759 F.2d 542, 544 (6th Cir. 1985); *Mid-State Fertilizer Co. v. Exchange Nat. Bk.*, 877 F. 2d 1333, 1335-36 (7th Cir. 1989); *Brennan v. Chestnut*, 973 F.2d 644, 648 (8th Cir. 1992); *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1419-20 (9th Cir. 1995); *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987).

The courts reason that the RICO violation injures only the corporation directly, whereas the shareholders and creditors are merely injured indirectly or derivatively as a secondary consequence of the corporation's general demise. *See, e.g. Manson*, 11 F.3d at 1130 (obligors on $450.000 corporate loan lacked RICO standing); *Whalen v. Carter*, 954 F.2d 1087, 1092-94 (5th Cir. 1992) (debenture

holders lacked RICO standing where fraud devalued corporation generally); *National Enterprise v. Mellon Fin. Serv.*, 847 F.2d 251, 254 (5th Cir. 1988) (creditor lacked RICO standing since injury was caused by corporation's bankruptcy, not by predicate acts that depleted corporate assets); *Crocker v. FDIC*, 826 F.2d 347, 350 (5th Cir. 1987) (shareholders lacked RICO standing where diminution in stock value occurred because of mismanagement).

As Beck himself has conceded, the predicate acts he pleaded were directed at and injured SIG and other third parties. R5-163 at 5. Beck has also conceded that he lost the value of his stock and loan only because "SIG went out of business." R5-138-Exh. U at 138. Therefore, Beck was not injured by any predicate act, and there is no proximate cause between the alleged RICO violations and his injuries. *See Pelletier*, 921 F.2d at 1499-1500. Beck is merely complaining of "harm flowing . . . from the misfortunes visited upon a third person," namely, SIG. *Holmes*, 112 S. Ct. at 1318.

Application of the three *Holmes* factors confirms that Beck's shareholder/creditor claims are derivative. First, it is impossible to determine whether SIG's bankruptcy and the resulting diminution in value of Beck's investment were caused by a RICO violation or some independent factor, such as the recessionary economy that existed in the late 1980's, sloppy underwriting practices, or poor business management by Beck and other officers. *See Holmes*, 112 S. Ct. at 1318, 1320.

Second, Beck cannot be granted standing without the adoption of complicated rules of apportioning damages

to protect other creditors and to prevent Beck from gaining a double recovery. *Holmes*, 112 S. Ct. at 1318, 1320. To allow Beck to pursue an individual RICO claim for a derivative injury would permit "double counting" of damages, since Beck would share in any recovery obtained by the trustee or receivers. *Mid-State Fertilizer*, 877 F.2d at 1335-36. Indeed, in May 1993 the Bellezza Group and other SIG directors paid a substantial settlement to the Florida receiver on behalf of SRC and SCI-Fla, and Beck, as a SIG shareholder and creditor, is a beneficiary of that recovery. R5-138-Exh.P.

Third, there is no need to grapple with these issues, since the directly injured victims – SIG and the Insurance Subsidiaries – have already filed suit to vindicate their rights. The same allegations Beck makes here have been the subject of four separate lawsuits by SIG's bankruptcy trustee and the Subsidiaries' receivers, in efforts to restore monies to the bankrupt estate for the benefit of *all* creditors and shareholders. A suit by an "indirectly injured victim" such as Beck "could be an attempt to circumvent the relative priority (his) claim would have in the directly injured victim's liquidation proceedings." *Holmes*, 112 S. Ct. at 1320-21, *citing Mid-State Fertilizer*, 877 F.2d at 1336; *see Rand v. Anaconda-Ericsson*, 794 F.2d 843, 849 (2d Cir. 1986).

In an effort to circumvent this clear RICO standing law, Beck asserted that his allegations fell within a narrow and limited exception to the derivative/no-standing rule. That exception permits shareholders and creditors to assert RICO claims where they suffer some "direct" injury that is "separate and distinct" from the injury suffered by the corporation or all stockholders-creditors

generally as a result of the corporation's insolvency. *See, e.g., Manson*, 11 F.3d at 1130-31; *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1279-80 (7th Cir. 1989).

Beck alleged that his "separate and distinct" injury was that he was fraudulently induced to purchase the SIG stock/debenture unit in a private offering. According to Beck, he "was told both orally and in writing" that he would continue to be SIG's CEO after the offering and that he purchased the SIG unit in reliance on this alleged promise. R5-163 at 7. However, as the district court found, "Beck offer[ed] no evidence at all – through affidavit, deposition transcript or otherwise by himself or anyone else that he orally was told that he would continue as CEO." R6-191 at 16.

Nor was there any written misrepresentation. Beck alleged that page 42 of the Private Placement Memorandum ("PPM") represented that he would continue as CEO after the offering; but the PPM said no such thing. It simply stated that "Robert A. Beck has served as President and as a director of the issuer since September 1983," and that "Mr. Beck is also *currently* Chief Executive Officer." R5-160-Exh.11 at 42 (emphasis added); R6-191 at 16. The district court found that the PPM "nowhere tells or promises Beck that he will continue as CEO of SIG; it merely lists him currently as CEO." The court also found that "Beck offer[ed] no other written evidence that he was told that he would continue as CEO." R6-191 at 16.

Moreover, Beck admitted that his CEO status was not material. He testified that, after learning in August 1986 that he was no longer CEO, he consciously decided to remain at SIG, believing he "had a great opportunity"

with a company he thought had a promising future. R6-165-Exh. B at 58. Additionally, Beck's own employment agreement, which he signed in June 1986 – two months before the private offering – merely promised him a five-year term as president; it made no promise that he would be CEO. Indeed, Beck conceded in his deposition that his employment agreement did not obligate SIG to keep him as CEO. R6-165-Exhs. A & B. The district court correctly concluded that Beck's CEO allegation was a "bald assertion" that was "insufficient to withstand a standing challenge on summary judgment." R6-191 at 16.

In view of the district court's analysis, Beck is simply wrong in asserting that the district court "failed to discuss the grounds for its rejection of" his claim for fraudulent inducement to purchase stock. Appellant's Br. ("App.Br.") at 40 n.5. The district court's discussion encompassed not only Beck's claim as a creditor for purchasing the $150,000 debenture but also his claim as a purchaser of $75,000 in stock, which he purchased along with the debenture in the August 1986 Private Placement. R6-191 at 16.

Beck does not challenge the district court's findings with respect to his CEO claim. Instead, he now argues that defendants fraudulently *concealed* their intention to remove him as CEO. App.Br. at 24. However, the "evidence" Beck submits does not support his allegation of nondisclosure.

First, he cites to the deposition of Theresa Waldron, a SIG employee, for the broad proposition that the "defendants" had decided prior to the private placement to

remove Beck as CEO. App.Br. at 7, *citing* R5-161-Exh.14 at 58-59. But the transcript reveals that Waldron merely gave hearsay testimony *that Ron Prupis* (another defendant) made an off-hand comment that "eventually he [Prupis] would be CEO." *Id.* at 59. This statement does not even implicate the Bellezza Group; nor is there is any proof that Prupis made this comment before Beck purchased his unit in August 1986.

Next, Beck alleges that defendants concealed a transaction in which Leonard Bellezza allegedly made a false promise to indemnify a contractor to enable that contractor to obtain bonds. App.Br. at 7-8. Beck submits no record evidence in support of this allegation, however, relying instead upon his pleadings. *Id., citing* R5-160-Exh. 1 (crossclaim) & Exh. 2 (RICO Case Statement). A party opposing summary judgment cannot rely on the bare allegations of his pleadings. Fed. R. Civ. P. 56(e). Rather, he must come forward with affidavits or admissible evidence tending to rebut defendants' right to summary judgment. *L.S.T., Inc. v. Crow*, 49 F.3d 679, 684 (11th Cir. 1995). Beck did not do that here.

In sum, as the district court recognized, Beck's fraud allegations regarding his August 1986 stock/loan investment are without factual foundation. Beck failed to create any genuine issue of material fact that he met the "separate and distinct injury" exception to RICO's derivative no-standing rule.

It is for this reason that the cases cited by Beck are inapposite. App.Br. at 26-29, 43. In all of those cases, the plaintiff proved that he was fraudulently induced to extend credit or to purchase stock, or that the defendant

used fraudulent means to avoid repayment of plaintiff's specific debt. *E.g., Ashland Oil*, 875 F.2d at 1280; *Ceribelli v. Elghanayan*, 990 F.2d 62 (2d Cir. 1993); *GICC Capital Corp. v. Technology Fin. Group*, 30 F.3d 289 (2d Cir. 1994). Here, however, there was no factual support for Beck's fraud allegations; his shareholder and creditor injuries were derivative, and he lacked RICO standing. His claims are derivative.

C. Beck's Stock Retention Claim Is Derivative.

Beck attempted to circumvent RICO standing limitations by asserting that defendants' alleged fraudulent misrepresentations caused him to "retain and forebear" from selling his SIG stock during 1987. App.Br. at 15. These allegations, however, do not establish any injury to Beck "separate and distinct" from the injury suffered generally by all of SIG's stockholders.

The district court held that Beck's "failure to sell" claim is nothing but a disguised derivative claim for stock diminution, given that all shareholders – not just Beck – were deprived of allegedly negative information about SIG. R6-191 at 18. Indeed, the courts unanimously agree that a "failure to sell" claim is a derivative claim for which an individual shareholder lacks RICO standing. *Chanoff v. U.S. Surgical Corp.*, 857 F. Supp. 1011, 1018, 1025 (D. Conn. 1994), *aff'd*, 33 F.3d 50 (2d. Cir.), *cert. denied*, 115 S. Ct. 667 (1994); *Arent v. Distribution Sciences, Inc.*, 975 F.2d 1370, 1372-73 (8th Cir. 1992); *Leach v. FDIC*, 860 F.2d 1266, 1267, 1273-74 (5th Cir. 1988); *Crocker v.* FDIC, 826 F.2d 347, 351 (5th Cir. 1987), *cert. denied*, 485 U.S. 905

(1988); *Schautteet v. Chester State Bank*, 707 F. Supp. 885, 890 (E.D. Tex. 1988).

The reason is that a failure to sell claim is "too speculative to state any injury to the shareholders, apart from a diminution in the value of their stock." *Crocker*, 826 F.2d at 350-51; *Chanoff*, 857 F. Supp. at 1018, 1025, *aff'd*, 33 F.3d 50 (2d Cir. 1994); *Schautteet*, 707 F. Supp. at 890; *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737-55 (1975) (Rule 10b-5 bars standing unless plaintiff actually bought or sold stock, because "failure to sell" claim is too speculative and would open floodgates to claims impossible to defend).

The courts further reason that a "failure to sell" claim would essentially permit an individual stockholder to unlawfully trade on inside information. As the Fifth Circuit explained in *Crocker*, the defendants' fraud causes the stock's value to be artificially inflated, and the inflated price is maintained only because of defendants' fraudulent concealment of financial information:

> It follows that, had this information been released, the stock price would have immediately and precipitously fallen. . . . Thus, there would have been no market for the stock at the artificially high price. Without such a market, the Crockers' envisioned "profit opportunity" evaporates into hardly more than an illusion.

Crocker, 826 F.2d at 351-52.

Thus, Beck's claim presents a "troublesome paradox": on the one hand he claims that the defendants' scheme caused his injury. On the other hand, without that scheme, he "could never have realized the artificially

high profit that [he] claim[s] to have unjustly lost." *Id.* at 352. Courts simply do not "recognize an injury based on a lost profit to which no one was lawfully entitled." *Crocker*, 826 F.2d at 351 & n.6; *accord Arent*, 975 F.2d at 1374; *Chanoff*, 857 F. Supp. at 1018.

D. Beck Lacks Standing to Assert His Guaranty Claim.

Beck alleged that his unrecouped attorneys' fees from the First Fidelity action constitute RICO damages flowing from his execution of the $7.5 million Guaranty. He was wrong. For three reasons, Beck lacks RICO standing to sue for damages resulting from his execution of the Guaranty.

(1) The Lack of Competent Evidence

In opposing summary judgment, Beck submitted no evidence to support his claim that the First Fidelity attorneys' fees exceeded the $425,000 he received from L2P2 in settlement of his legal malpractice claim. He relied solely upon an unsupported assertion in a footnote of his brief. Such unsupported assertions are incompetent to show injury to business or property, and cannot prevent entry of summary judgment. *See L.S.T., Inc. v. Crow*, 834 F. Supp. 1355, 1361 (M.D. Fla. 1993), *rev'd on other grounds*, 49 F.3d 679 (11th Cir. 1995); *Quest Exploration v. Transco Energy*, 24 F.3d 738, 742 (5th Cir. 1994).

(2) The Absence of Proximate Cause

Even assuming Beck sustained an injury, it was not proximately caused by any RICO violation. *Holmes*, 112 S. Ct. at 1318. Several Courts have discussed whether attorneys' fees constitute proximately caused RICO damage, and a clear rule has emerged: where legal fees are expended as an *"intended consequence"* or *"integral component"* of a defendant's racketeering activities, those fees may constitute RICO damages. But where "litigation (or its threat) was neither an *instrument of the racketeering activity* nor *a harm intended to the victim,"* the attorneys' fees are not recoverable, because they are not proximately caused by the predicate acts. *Lemelson v. Wang Laboratories, Inc.*, 874 F. Supp. 430, 433 (D. Mass. 1994) (collecting cases); *accord Miller Hydro Group v. Popovitch*, 851 F. Supp. 7, 13-14 & n.6 (D. Me. 1994) (attorneys' fees recoverable only when they "stem from actual RICO violations").

This rule is illustrated by the very cases Beck cites. In all of those cases, the plaintiff's attorneys' fees were recoverable only because they were incurred defending or prosecuting litigation that was an "integral component" of the defendants' RICO scheme. App.Br. at 31-32; *See Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1167 (2d Cir. 1993) (attorneys' fees recoverable because defendant committed bankruptcy fraud and mail and wire fraud specifically to avoid collection of judgment owed to plaintiff); *Bankers Trust v. Rhoades*, 859 F.2d 1096, 1105 (2d Cir. 1988) (attorneys' fees recoverable because they were incurred attempting to collect a debt that defendant was fraudulently avoiding through predicate

acts of bribery of judges, bankruptcy fraud and fraudulent lawsuits); *Malley-Duff & Assocs. v. Crown Life Ins. Co.*, 792 F.2d 341, 354-55 (3d Cir. 1986), *aff'd on other grounds*, 107 S. Ct. 569 (1987) (litigation expenses recoverable since they were caused directly by defendant's obstruction of justice in prior federal litigation); *Lemelson*, 874 F. Supp. at 432-33 ("the taxing of victims with the prospects of vexatious litigation is an *integral component* of the racketeering scheme") (emphasis added).

Conversely, courts have not permitted recovery of attorneys' fees and other incidental expenses that were incurred indirectly and that were not an "integral component" of the defendants' RICO scheme. For instance, in *Miller Hydro*, defendant fraudulently performed a construction contract to increase plaintiff's payments. When plaintiff refused to pay the inflated amounts, defendant filed a breach of contract suit, which plaintiff defended and won. Subsequently, plaintiff filed a RICO action, alleging as damages the attorneys' fees incurred in the first suit. The court dismissed the RICO claim, holding that the legal fees were not proximately caused by any *predicate acts*. Rather, the fees were incurred because of defendant's non-criminal act of filing the prior breach of contract action. 851 F. Supp. at 13-14 & n.6. *See also Willis v. Lipton*, 947 F.2d 998, 1000-01 (1st Cir. 1991); *Rylewitz v. Beaton Services, Inc.*, 698 F. Supp. 1391, 1395-96 (N.D. Ill. 1988), *aff'd*, 888 F.2d 1175 (7th Cir. 1989); *Capasso v. CIGNA Ins. Co.*, 765 F. Supp. 839, 842 (S.D.N.Y. 1991); *Doe v. Roe*, 756 F. Supp. 353, 360 n.11 (N.D. Ill. 1991).

Beck's attorneys' fees fall within the latter line of cases and are not compensable under RICO, since the Bellezza Group never used fraudulent litigation as an

"integral component" or "instrument" of its alleged RICO scheme. *Lemelson*, 874 F. Supp. at 433. Indeed, all nine SIG directors (including the four members of the Bellezza Group) signed the Guaranty. Obviously the last thing they intended was for litigation to ensue, especially litigation aimed at holding them liable under the Guaranty.

In fact, Beck's attorneys' fees were expended indirectly only after several other contingent events occurred. First, SIG's business declined. Second, SIG defaulted on the First Fidelity note. Third, SIG declared bankruptcy, preventing First Fidelity from collecting against the primary obligor. Fourth, First Fidelity sued all nine of the guarantors, including Beck. And finally, Beck defended that claim on the merits and asserted a malpractice claim against L2P2. Thus, Beck's attorneys' fees were incurred only after SIG went bankrupt and only because First Fidelity committed the non-predicate act of filing suit on the Guaranty. *See Miller Hydro*, 851 F. Supp. at 14 (no proximate cause because "legal fees stemmed from [defendant's] decision to file a breach of contract action").

Therefore, Beck has not proven that his First Fidelity attorneys' fees were proximately caused by a predicate act. *Pelletier*, 921 F.2d at 1497, 1499-1500, *Holmes*, 112 S. Ct. at 1318.

(3) The Absence of Any Fraud

Even if attorneys' fees were somehow theoretically compensable under the facts of this case, Beck's fraud claim was without merit. The alleged fraudulent inducements included: (a) alleged reliance on an allegedly

inflated financial projection or estimate; (b) alleged concealment of transactions between SIG/CPC and Chief Structures, a contractor; and (c) alleged concealment of defendants' alleged plans to terminate Beck. R5-138-Exh. B, ¶2a. vi., at 3-4. Beck's own deposition testimony confirmed that he was not deceived when he signed the Guaranty.

(a) Beck admitted that the allegedly false projection was given only to, and relied upon only by, First Fidelity in extending the $7.5 million loan to SIG. *Beck conceded that he never received the projection before signing the Guaranty.* R5-138-Exh. 15 at 120-21. Thus, Beck could not prove that he was the "target of the scheme to defraud," or that he "relied to his detriment on misrepresentations made in furtherance of that scheme." *Pelletier*, 921 F.2d at 1499-1500; *Kingston Square Tenants Ass'n v. Tuskegee Gardens*, 792 F. Supp. 1566, 1578 (S.D. Fla. 1992).

Beck's reliance upon *Warner v. Alexander Grant & Co.*, 828 F.2d 1528 (11th Cir. 1987), is misplaced. There, the Court held that Warner could sue directly only because he signed a guaranty in actual reliance on false financial statements *"directed to Warner personally." Id.* at 1531 (emphasis added). Here, by contrast, false financial information was not "directed to [Beck] personally" but rather was given to First Fidelity. Beck could not have relied upon a document he did not know existed when he signed the Guaranty.

(b) Beck alleged that he would not have executed the Guaranty had he known of the true nature of transactions involving Chief. App.Br. at 8-12. In 1987, SCI-Fla issued surety bonds to Chief, but Chief had difficulty

completing its construction jobs and paying its materialmen. SIG agreed to a workout whereby it loaned money to Chief to help complete those jobs. A Joint Venture Agreement was executed in September 1987 in which CPC, SIG's subsidiary, agreed to assist Chief in financing the construction projects and in obtaining new surety bonds. Beck contends that these loans should have been treated as claims or losses on the Insurance Subsidiaries' books, but the defendants allegedly treated them as "notes receivable" or assets. Beck contends that treating these loans as assets inflated SIG's financial condition. He says he was unaware of the joint venture and workout/loan transactions and that he never would have guaranteed the First Fidelity loan had he known of them. R5-138-Exh.3.

Beck's extensive deposition testimony, however, confirms that he had full knowledge of the Chief situation. He conceded that he was SIG's president and that he was responsible for financial matters, including preparing and submitting financial statements to regulators. R5-138-Exh.4; R6-165-Exh.A, ¶3.1(a). Beck also testified that he was on the management Claims Committee that assessed surety bond claims and established "loss reserves" on SIG's books. He admitted that he was aware when he signed the Guaranty that approximately $2 million was loaned by SIG to Chief and other contractors. R5-138-Exh.5. He also admitted that, in December 1987 before he signed the Guaranty, he had arguments with SIG principals in which he insisted that Chief transactions should be listed as losses or claims on SIG's financial statements. *Id.*

Beck further admitted to having substantial knowledge of the joint venture/workout arrangement among

SIG, Chief and CPC. He testified that from September to December 1987, he signed SIG checks totalling more than $321,000 payable to Chief, CPC or both. Beck also admitted that these checks contained the notations "joint venture" or "workout." R5-138-Exh.6; R6-165-Exh.F. He thus was forced to concede that he was aware, prior to signing the Guaranty, that the reason SIG was making advances to Chief was to help Chief complete its construction projects and pay its vendors, the usual indicators of a default. R5-138-Exh.7. Also, Beck admitted that SIG director Neil Prupis told him that the loans to Chief would continue to be made in the future. R5-138-Exh.8; R5-138-Exh.12.

Beck also alleged that he was unaware that Chief was being treated as a receivable/asset on SIG's books when in reality it was a claim/loss. This assertion too was specious. As SIG's president, Beck himself prepared and signed the September 1987 quarterly financial statements. R6-165-Exh. E. Moreover, Beck admitted that, in December 1987, he *believed* the Chief loans were claims or losses; obviously, then, he was not deceived by any suggestion to the contrary. R5-138-Exh.9. Moreover, in December 1987, the year-end financial statements had not even been prepared, so the Chief situation had not yet been finally classified when Beck signed his Guaranty. Whether Chief was an asset or a loss was purely an accounting issue that did not arise until 1988 when Deloitte Haskins & Sells, SIG's auditors, prepared SIG's 1987 year-end financial statement – months after Beck signed the December 1987 Guaranty. R5-138-Exh.11 (1987 year-end financials); R5-138-Exh.11 (Beck Dep. at 140-51). In fact, when Deloitte prepared SIG's 1987 year-end financials in May

1988, it properly classified the Chief transactions as claims. R5-138-Exh.11 at 8-10, 17.

Because Beck was armed with all of this knowledge when he signed the Guaranty, there was no merit to his claim that he was unaware of the Chief situation or of SIG's financial condition. Nor could he seriously argue that he relied on any misrepresentations or concealments. As this Court held in *Pelletier*, "when the plaintiff's evidence conclusively proves the opposite of his allegations, summary judgment in the defendant's favor is appropriate." 921 F.2d at 1507, 1509-10. In *Pelletier*, the Court dismissed a RICO claim because plaintiff's own deposition testimony showed that he entered the transaction "with his eyes wide open" and that he "did not rely on the alleged misrepresentations"; therefore, he could not prove that his injury was proximately caused by defendant's fraud scheme. As in *Pelletier*, Beck signed the Guaranty "with his eyes wide open." His own deposition testimony proved "the opposite of his allegations." *See* 921 F.2d at 1507; *see also Hibiscus Assoc. v. Board of Trustees*, 50 F.3d 908, 920 (11th Cir. 1995).[2]

(c) Finally, Beck alleged that defendants concealed their intention, supposedly formed in December 1987, to fire him as president. But Beck submitted no evidence

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[2] The courts have consistently dismissed RICO claims where the plaintiff failed to prove reliance. *E.g., Blount Fin. Servs. v. Walter E. Heller & Co.*, 819 F.2d 151, 153 (6th Cir. 1987); *Grantham & Mann v. American Safety Prods., Inc.* 831 F.2d 596, 606 (6th Cir. 1987); *Mid-State Fertilizer*, 877 F.2d at 1337; *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1312 (2d Cir. 1990).

that any member of the Bellezza Group had decided in December 1987 to fire him. Again on appeal, he relies on his own pleadings and on irrelevant deposition transcripts containing hearsay. App.Br. at 14.

For example, Beck relies on Exhibit 20, Ron Prupis's affidavit from another lawsuit. That affidavit merely states that at a December 1987 meeting a *Smith Barney employee* suggested that Beck should be terminated. Prupis did not say that the Bellezza Group agreed to terminate Beck or that the board of directors made a decision. Beck also refers to Exhibit 36, the deposition testimony of former SIG employee Paul Price. But Price merely gave hearsay testimony that Judy Weaver (another SIG employee) told him Beck would be terminated. Nowhere was it indicated whether anyone had made an actual decision to fire Beck, or whether Weaver was merely relaying a rumor. More importantly, Price's testimony simply does not say that any member of the Bellezza Group had formed an intent in December 1987 to fire Beck. The rest of the cited exhibits do not even mention the Bellezza Group; they all imply that *Ron Prupis* wanted to take control of SIG for his own personal reasons. App.Br. at 14, *citing* Exh. 16, 18, 36-38.

Thus, all that can be said of Beck's factual references is that there were rumors – not secret decisions – of Beck being fired. Those rumors did not even implicate the Bellezza Group and cannot be traced to December 1987.

* * *

In sum, Beck has not shown that the First Fidelity Guaranty proximately caused him any injury to business or property. Nor has he produced any record evidence to

show that he was fraudulently induced to sign the Guaranty. He therefore lacks RICO standing.

E. Beck Lacks Standing as a Whistleblower.

Beck's next claim is that he was wrongfully terminated as SIG's president in May 1988 in violation of RICO's conspiracy provision, §1962(d). To support this claim, Beck alleges that defendants hatched a scheme in 1986 to create fraudulent causes for a termination that occurred *in 1988*, to brand him as a scapegoat for their alleged illegal activities, and to prevent him from blowing the whistle on their alleged illegal activities. R5-138-Exh.A, ¶¶43-60; Exh.B, ¶4.a.i. Even if these allegations are true, however, Beck lacks RICO standing under §1964(c) because his loss of employment was not caused directly by any predicate acts.

1. Eleventh Circuit Precedent Bars Beck's Claim.

As the district court recognized, the Eleventh Circuit has held that an employee terminated for blowing the whistle does not have RICO standing. The Court reasoned that plaintiff's loss of employment was not proximately caused by a predicate act and therefore did not satisfy §1964(c). R6-191 at 20-21; *Morast v. Lance*, 807 F.2d 926, 933 (11th Cir. 1987); *see also O'Malley v. O'Neill*, 887 F.2d 1557, 1561 (11th Cir. 1989); *Pelletier*, 921 F.2d at 1499-1500. Therefore, under Eleventh Circuit precedent, the district court properly dismissed Beck's whistleblower conspiracy claim as a matter of law.

Beck attempts to distinguish *Morast*, but this attempt is unavailing. Beck argues that the plaintiff in Morast was fired solely for *reporting* a prior irregular transaction, but that the Court suggested that plaintiff might have succeeded had he alleged termination because of a *refusal to participate* in the illegal scheme. App.Br. at 33-34, citing *Morast*, 807 F.2d at 933 n.8. In contrast, he says, he alleged that he was fired because he refused to participate in defendants' activities. *Id.*

The district court held that there was "no basis on which to distinguish this case from *Morast* and *O'Malley*," because "the decision to fire Beck was tangentially related to any RICO violations that may have occurred." R6-191 at 21. The court was correct. In *O'Malley*, this Court held there is no difference between a discharge for refusal to participate and a discharge for reporting illegal activity, since "in either case the injury does not flow directly from the predicate acts." 887 F.2d at 1562. *See Cullom v. Hibernia Nat. Bank*, 859 F.2d 1211, 1217 (5th Cir. 1988). Thus, Beck's argument ignores the requirement that plaintiff's injury be caused directly by predicate acts of racketeering, rather than by defendant's non-criminal "other conduct." *Pelletier*, 921 F.2d at 1499; *see Sedima*, 473 U.S. at 496-97.

Because the act of firing Beck was not a predicate act, the district court was correct in dismissing Beck's whistleblower conspiracy claim.

2. Section 1962(d) Requires Predicate Act Injury.

Recognizing that Eleventh Circuit precedent bars his RICO conspiracy claim, Beck asks this Court to ignore that precedent and apply the minority rule, which permits a whistleblower to assert a RICO conspiracy claim. App.Br. at 36-40, *citing Shearin v. E.F. Hutton Group. Inc.*, 885 F.2d 1162 (3d Cir. 1989); *Schiffels v. Kemper Fin. Services, Inc.*, 978 F.2d 344 (7th Cir. 1992). *Shearin* and *Schiffels* held that a RICO plaintiff has standing to sue for a conspiracy if he was injured by an overt act committed in furtherance of the conspiracy, even if that overt act was not a predicate act. But a clear majority of the Circuits are in accord with this Circuit in holding that a plaintiff has RICO conspiracy standing only if he was injured by a predicate act. *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 48 (1st Cir. 1991); *Hecht v. Commerce Clearing House*, 897 F.2d 21, 25 (2d Cir. 1990); *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1344-45 (2d Cir. 1994); *Cullom v. Hibernia Nat. Bank*, 859 F.2d 1211, 1217-18 (5th Cir. 1988); *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir. 1993); *Reddy v. Litton Industries*, 912 F.2d 291, 295 (9th Cir. 1990).

There is no good reason to depart from *Morast* and *O'Malley*. But Beck asks this Court to overrule that controlling precedent, arguing that a predicate act requirement contravenes RICO's plain meaning. Since §1964(c) provides standing to anyone injured by "a violation of §1962," and since §1962(d) prohibits conspiracies, Beck argues that any person harmed by a conspiracy should have RICO standing, whether or not the injury resulted

from a predicate act. App.Br. at 36-38. Beck's interpretation of the statute is overly literal and mechanistic, however, because it reads §1962(d) in a vacuum without reference to RICO as a whole. Indeed, his interpretation ignores several canons of statutory construction.

First, even in reading a statute's "plain meaning," a court must do more than view subsections in isolation. Rather, the court must derive meaning from context, and must "look to the provisions of the whole law, and to its object and policy." *United States Nat. Bank of Oregon v. Independent Ins. Agents*, 113 S. Ct. 2173, 2182 (1993); *accord In re Rufener Constr., Inc.*, 53 F.3d 1064, 1066-67 (9th Cir. 1995); *Homeland Stores, Inc. v. RTC*, 17 F.3d 1269, 1273 (10th Cir. 1994); *United States v. Chandler*, 996 F.2d 1073, 1084, *reh'g en banc denied*, 5 F.3d 1501 (11th Cir. 1993).

Second, if reliance on the statute's literal language would "defeat the plain purpose of the statute," the court should go beyond that literal language and follow the statute's purpose. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983); *see United States v. American Trucking Ass'n*, 310 U.S. 534 (1940); *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995) (rejecting literal reading of Bankruptcy Code §523 that would have contravened the Code's underlying purpose).

Finally, a statute should be construed so that all its provisions are given effect and so that no part will be rendered inoperative or superfluous. *Homeland Stores*, 17 F.3d at 1273. When two subsections of legislation are in apparent conflict, the court should attempt to reconcile them to carry out the statute's overall purpose, "instead of allowing one provision effectively to nullify the other

provision." *United States v. Gordon*, 961 F.2d 426, 431 (3d Cir. 1992); *see Love v. Thomas*, 858 F.2d 1347, 1354 (9th Cir. 1988); *Herriman v. Conrail, Inc.*, 887 F. Supp. 1148, 1154 (N.D. Ind. 1995); *Moncrief v. Williston Basin*, 880 F. Supp. 1495, 1517 (D. Wyo. 1995).

Here, Beck's theory is inherently flawed because it suffers from tunnel vision: it attempts to construe two discrete provisions out of context and without regard to RICO's overall purpose. In contrast, predicate act requirement furthers RICO's overall purpose by narrowing the focus of §1962(d) suits "to the *specific racketeering activity that lies at the heart of the RICO statute.*" *Bowman*, 985 F.2d at 388 (emphasis added) As the First Circuit explained,

> Congress painstakingly enumerated a complete list of predicate acts in 18 U.S.C. § 1961(1). For judges, under a conspiracy rubric, to allow RICO damages for an injury caused other than by an enumerated predicate offense would be tantamount to rewriting the statute.

Miranda, 948 F.2d at 48; *see also Hecht*, 897 F.2d at 25 (Congress did not "deploy RICO as an instrument against all unlawful acts").

Beck's expansive theory would render most of RICO meaningless, because it would allow RICO plaintiffs, through "artful" pleading, to "circumvent the predicate act requirement applicable to suits based on §1962(a)-(c) simply by alleging a conspiracy to commit those same substantive acts." *Bowman*, 985 F.2d at 388. Under Beck's theory, RICO would be transformed into a federal super-tort statute, with RICO plaintiffs able to recover for mere "overt" or tortious acts. Congress did not intend to criminalize mere tortious activity under the rubric of a RICO

"conspiracy." *See Willis v. Lipton*, 947 F.2d 998, 1001 (1st Cir. 1991); *Miranda*, 948 F.2d at 49.

In short, under Beck's approach, RICO would be turned on its head, with the conspiracy provision eclipsing the three substantive racketeering provisions that inform it. This would "defeat the plain purpose of the statute." *Bob Jones Univ.*, 461 U.S. at 586; *American Trucking Ass'n*, 310 U.S. at 543.

Conversely, the predicate act requirement – accepted by this Court and a majority of other Circuits – effectively reconciles the potential conflict between §1962(d) and §1964(c). Contrary to Beck's assertion that the predicate act requirement renders §1962(d) superfluous, that requirement leaves open substantial liability under the civil conspiracy provision. This is illustrated by a simple hypothetical.

Suppose five individuals conspire to direct a pattern of racketeering activity at a particular plaintiff, but only one of them actually commits the predicate acts. Under those facts, only the person actually committing the predicate acts can be liable under §1962(c), because the other four did not actually "conduct the enterprise's affairs" through a pattern of racketeering activity. 18 U.S.C. §1962(c); *see Aetna Cas. & Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1558, 1560 (1st Cir. 1994); *United States v. Private Sanitation*, 793 F. Supp. 1114, 1140-41 (E.D.N.Y. 1992). However, those four persons would still be liable under §1962(d), since they "conspire[d] to violate" §1962(c), and the plaintiff was injured by the pattern of racketeering committed by the fifth conspirator. 18 U.S.C. §1962(d); *see Aetna*, 43 F.3d at 1562-63 (conspirators are jointly and

severally liable for the racketeering conduct of other conspirators, even if some conspirators are unaware of "entire conspiratorial sweep").

Thus, under RICO's civil conspiracy provision, Congress's likely intent was to provide a procedural mechanism for holding all conspirators vicariously liable for the predicate acts committed by one of them. *See Aetna*, 43 F.3d at 1562-63; *Medallion TV Enter. v. SelecTV of Calif.*, 627 F. Supp. 1290, 1298 (C.D. Cal. 1986), *aff'd*, 833 F.2d 1360 (9th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989).

In sum, sections 1964(c) and 1962(d) can be harmonized without any RICO provision being rendered superfluous. Whereas Beck's approach would eviscerate sections 1962(a)-(c) by allowing RICO plaintiffs to recover for mere tortious acts; the predicate act requirement maintains the integrity of §§1962(a)-(c) while leaving intact substantial conspiracy liability under §1962(d) for persons not liable under §1962(a)-(c).

3. In Any Event, Beck's Loss of Employment Was Not Proximately Caused by any RICO Violation.

Even if there were some theoretical basis on which to deviate from *Morast* and *O'Malley*, Beck would still be unable to show that his loss of employment was proximately caused by an overt act in furtherance of the alleged RICO conspiracy. Indeed, in the very case relied upon by Beck, the court followed the minority view but still dismissed the plaintiff's whistleblower conspiracy claim, because her loss of employment was not proximately caused by a conspiracy to violate RICO. *Schiffels*,

978 F.2d at 353. Here, the record is devoid of evidence tending to prove that Beck was terminated because he posed a threat as a whistleblower.

Beck's conspiracy allegation is centered on defendants' alleged May 1988 agreement with Firemark to create false causes for Beck's termination. The only evidence Beck submitted to support this allegation is that defendants supposedly held clandestine meetings at which they decided to retain Firemark, and that Firemark wrote a report allegedly falsely impugning Beck's managerial abilities. App.Br. at 16.

Regarding the supposed secret meetings, the only evidence Beck submitted consisted of hearsay and innuendo. As he did in the district court, Beck refers only to Exhibits 36 (Price Dep.), 39 (Sendaydiego Dep.), 42 (Weaver Dep.), 43 (Petigrow Dep.), and 12 (Beck Dep.), *none of which discuss any meetings involving the Bellezza Group*. Instead, the cited exhibits refer to hearsay statements of Judy Weaver, Ron Prupis and employees Price and Sendaydiego about Beck's rumored termination and his lesser job responsibilities. None of the transcripts provide evidence that *the Bellezza Group* created *false causes* for Beck's termination. *See Plaisance v. Travelers Ins. Co.*, 880 F. Supp. 798, 804 (N.D. Ga. 1994), *aff'd*, 56 F.3d 1391 (11th Cir. 1995) (plaintiff cannot avoid summary judgment by relying on "speculation and unsubstantiated hearsay").

There is also no exhibit addressing any secret meeting at which Firemark was hired and told to create false causes for Beck's termination. The cited exhibits do not even mention Firemark. Indeed, the New Jersey district

court dismissed Beck's claim against Firemark, finding no evidence of any conspiracy involving Firemark. R5-138-Exh. L. The New Jersey district court found that there was nothing false about the Firemark report:

> [T)he questionable conduct described in the Report is attributed solely to neither Beck nor any other member of management. Additionally, *it is illogical for Beck to claim that the Report was false when it documents the same misconduct that Beck asserts occurred at SIG.*
>
> * * * *
>
> Although the Report does recommend Beck be terminated, it does not explicitly attribute any wrongdoing to Beck alone. If anything, the Report suggests that much of the management of SIG was to blame. The Report recommends termination or investigation of numerous officers or directors in addition to Beck.

R5-138-Exh.L at 44-45, 51 (emphasis added).

Since Beck's conspiracy claim against Firemark was dismissed five years ago, the only new evidence Beck has proffered of Firemark's purported falsification of grounds for his termination is the double hearsay testimony of a former Firemark employee, Bonnie Smith. App.Br. at 16; R5-162-Exh.44. Smith stated that Michael Morrissey, a Firemark principal, told her that Firemark recommended Beck's termination because Joanne Morrissey, Firemark's president, wanted Beck's job. *Id.* Even if this were true, the inference Beck attempts to draw from it – that the Bellezza Group wanted to fire Beck because of his whistleblowing activities – is absurd. Whatever may have

been Joanne Morrissey's career motivations, they have nothing to do with RICO.

Thus, Beck cannot prove that defendants terminated him because of his whistleblowing activities. As in *Schiffels*, Beck cannot prove that his loss of employment was proximately caused by any RICO conspiracy, and the district court properly dismissed his whistleblower-conspiracy claim.

POINT II

BECK CANNOT PROVE A PATTERN OF RACKETEERING ACTIVITY.

The district court declined to address whether Beck could prove a pattern of racketeering activity. R6-191 at 11. The fact was, however, that there was no such pattern. Therefore, summary judgment can be affirmed on the alternative ground that Beck could not prove a pattern of racketeering activity.

A "pattern" requires "at least two acts of racketeering activity." 18 U.S.C. §1961(5). Two isolated predicate acts do not constitute a "pattern." *Sedima*, 473 U.S. at 496 n.14. Rather, to establish a pattern, the plaintiff must prove that the predicate acts were both related and continuous, that is, that they either "amount to" or "pose a threat of continued criminal activity." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Continuity is a "temporal concept" because RICO is concerned primarily with "long-term criminal conduct." *Id.* at 241-42; *see Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 970-71 (11th Cir. 1986). Thus, predicate acts extending over a few weeks or months, and threatening no future criminal

conduct, do not constitute a pattern. *H.J., Inc.* 492 U.S. at 242.

Beck asserts that the 50 predicate acts he pleaded in his crossclaim and RICO Case Statement form a pattern. App.Br. at 16-17; R5-163 at 5. But even assuming those 50 predicate acts comprise a pattern *against third parties* such as SIG, contractors and First Fidelity, Beck cannot rely on that pattern to support his own RICO claim, because the separate frauds allegedly directed against him are wholly unrelated to that pattern.

In *H.J., Inc.*, the Supreme Court defined relatedness to mean "criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics, and are not *isolated events.*" *H.J., Inc.*, 492 U.S. at 240 (emphasis added). In applying this test, the courts have made clear that a RICO plaintiff cannot, for purposes of establishing a pattern, latch onto wholly unrelated predicate acts targeting third parties.

For instance, in *Vild v. Visconsi*, 956 F.2d 560 (6th Cir. 1992), the plaintiff alleged two different categories of predicate acts, as Beck does here. The first type of conduct involved mail and wire fraud and extortion "directed at the plaintiff," who was fraudulently induced to enter a joint venture to market real estate interests in a resort. The second type of conduct involved various wrongs "directed at others," such as real estate purchasers and state governments. *Id.* at 566. The Sixth Circuit held that these two types of predicate acts had different purposes, different results and different victims; therefore, they did not satisfy *H.J., Inc.'s* relatedness

prong. *Id.* at 566-67. The Court reasoned that the plaintiff "may not use unrelated predicate acts that allegedly may have harmed ultimate purchasers and other third parties not similarly situated to the plaintiff." *Id.* at 567.

The same is true here. Beck cannot use the "unrelated" 50 predicate acts, which he concedes caused him no damage and which he admits were directed at "third parties," to satisfy the pattern requirement. *Vild*, 956 F.2d at 567; *see also Heller Financial, Inc. v. Grammco Computer Sales*, 71 F.3d 518, 524-25 (5th Cir. 1996) (no relatedness where two categories of predicate acts had different purposes, results, and methods of commission); *Shearin*, 885 F.2d at 1168 (plaintiff could not recover for fraudulent hiring, because that predicate act was "dissimilar" from securities fraud committed against employer's customers).

Because Beck cannot rely on the 50 pleaded predicate acts to establish a pattern, he must establish that the August 1986 stock/debenture purchase and the December 1987 Guaranty establish their own separate pattern of racketeering. However, these two alleged predicate acts are unrelated. "The relatedness inquiry focuses on the interrelationship of charged RICO predicates, thereby ensuring that a person is not subjected to sanctions for committing *two widely separated and isolated criminal events.*" *Heller*, 71 F.3d at 524 (emphasis added).

Here, the August 1986 private offering was completely unrelated to the December 1987 First Fidelity loan; those transactions were "two widely separated and isolated" events occurring 16 months apart and having nothing in common. *Heller*, 71 F.3d at 524; *see Feinstein v.*

Resolution Trust Corp., 942 F.2d 34, 44-45 (1st Cir. 1991) (no pattern because real estate transactions occurring two years apart were unrelated). Although these acts involve similar participants and a similar victim, RICO's relationship prong requires more than a mere "articulable factual nexus." *Heller*, 71 F.3d at 525. There is no real nexus between the private offering and the Guaranty, other than the fact that they both involved SIG and Beck. *See Vild*, 956 F.2d at 567-68 (no relatedness even though predicate acts involved similar participants); *Feinstein*, 942 F.2d at 44-45 (no relatedness even though predicate acts involved similar victims and participants).

Finally, it goes without saying that neither the stock/debenture purchase nor the First Fidelity Guaranty individually amount to a pattern. Both were short-lived schemes lasting no more than a few days or weeks. *H.J., Inc.*, 492 U.S. at 242. Because RICO prohibits only "long-term" racketeering, a single fraudulent scheme directed against a single victim does not amount to a pattern. *See Aldridge v. Lily-Tulip, Inc.*, 953 F.2d 587, 592-93 (11th Cir. 1992) (single scheme lasting only six months did not constitute pattern).

POINT III

THE PENDENT CLAIMS WERE PROPERLY DISMISSED.

Beck argues that the district court abused its discretion by refusing to exercise supplemental jurisdiction over his state law claims, because those claims are now time-barred under Florida law. There was no abuse of discretion.

Beck began this litigation's tortuous journey in 1989 by filing suit in Florida state court. He later voluntarily dismissed that suit and reasserted it in the New Jersey district court, in an obvious attempt to forum-shop and in clear violation of the forum selection clause of his employment agreement. Once the case was transferred to the federal court in Florida in 1991, Beck allowed three years to elapse without moving the litigation forward; he did not file his RICO Case Statement until 1994. *See* R1-1; R1-25. He then forced defendants to engage in an intense period of discovery to defend against the 50 predicate acts he pleaded – acts that he ultimately admitted did not cause him any RICO injury.

In these circumstances, any statute of limitations problem Beck may have is entirely of his own doing. As the Ninth Circuit stated in a similar situation: "[O]nce a plaintiff initiates multiple litigation by filing his state claims in both state and federal courts, it is not an abuse of discretion for the federal court to decline to consider a state court time-bar as a determinative factor in deciding whether to retain jurisdiction over pendent claims after dismissing federal claims." *Notrica v. Board of Supervisors*, 925 F.2d 1211, 1215 (9th Cir. 1991). "It is not the function of a federal court to rescue a party from the danger of limitation by permitting the litigation of inappropriate matters in federal court." *Quality Foods v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 1000 (11th Cir. 1983).

CONCLUSION

For the foregoing reasons, the judgment entered below should be affirmed.

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CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via Federal Express on March 1, 1996 to all counsel on the attached service list.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 95-4844

ROBERT A. BECK, II,

Plaintiff, Appellant,

vs.

RONALD M. PRUPIS, LEONARD BELLEZZA, ERNEST J. SABATO, WILLIAM PAULUS, JR., HARRY OLSTEIN, FREDERICK C. MEZEY, BYRON L. SPARBER, JOSEPH S. LITTENBERG,

Defendants, Appellees.

_____/

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

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I. THE NEW JERSEY GROUP'S STATEMENT OF FACTS DISTORTS THE RECORD.

The Statement of Facts contained in the New Jersey Group's Answer Brief omits material evidence and misstates other evidence, creating a distorted statement of the record. For the most part, the Statement of Facts in

Beck's Initial Brief corrects the distortions, and will not be repeated here. In other instances, however, additional mention is necessary.

First, the New Jersey Group's Answer Brief at 12-14 contains a glaring misrepresentation – the New Jersey Group states that, until Beck's Opposition to the Motion for Summary Judgment, Beck argued that he was directly injured by the predicate acts targeted at third parties and, then, changed his position to that "[the 50 predicate acts pled in his complaint and RICO Case Statement] were 'plead in the instant case merely to satisfy RICO's pattern requirements." *Id.* at 13.

These unambiguous statements are simply false. From the very outset of this case, Beck has consistently maintained in clear statements that the Complaint alleged certain predicate acts committed against Beck *and* that the remaining predicate acts were merely plead to satisfy RICO's pattern requirement. First, in Beck's responses to the New Jersey Group's Motion to Dismiss (which was filed twice – once in New Jersey in *1991* and once in Florida in *1994*), Beck detailed this position, stating:

> In the instant case, the focus of the substantive claims is the damages Beck suffered by reason of being fraudulently induced to guaranty and extend loans. . . . *The remaining predicate acts are plead solely to fulfil the pattern requirement* (emphasis supplied).

R1-28-19; *see also* R5-138-Ex L at 10-11; R7-222 at 1-3. Similarly, Beck's RICO Case Statement made clear that Beck's claim was for the injuries he particularly suffered (set forth in section 2 of that document), and that the

remaining predicate acts (set forth in section 3) were merely present to establish pattern (R1-25).

The New Jersey Group also selectively quotes from Beck's nine-day deposition, arguing that Beck conceded that his injuries were derivative. Answer Brief at 7-12. This, again, is simply untrue. The portions of the deposition quoted by the New Jersey Group refer only to the demise of SIG, rather than to the fraudulent inducement of Beck. When the questioning related to the predicate acts against Beck and his injuries therefrom, however, Beck testified:

> Q. Were you hurt because you lost the value of your investment in SIG? Is that how you were hurt as a result of what you are telling us?
>
> A. I was hurt because information was withheld from me and had I had that information I could have prevented losses to myself and to others. I could have prevented the loss on signing the First Fidelity guarantee. I could have prevented the loss that I suffered due to the loss of my employment. I could have prevented the loss on the value of the stock. I could have prevented the loss that came about from the unsecured loan.
>
> I could have prevented all the damages had all these things that have been withheld from me not been withheld from me.

R5-160-Ex 9 at 33-34; *see also* R5-160-Ex 10 at 72-73 ("This was vital information which was withheld from me [Beck]."); R5-161-Ex 18 (detailing Beck's direct injuries).

II. BECK HAS STANDING TO PURSUE HIS SHAREHOLDER AND CREDITOR CLAIMS.

In its Answer Brief at 22, the New Jersey Group concedes that, under the well-established exception recognized by this Circuit, creditors have standing to sue for injuries caused by a fraud directly perpetrated upon them, even if the corporation has suffered an identical injury for which it has a similar right of recovery. *See also* Initial Brief at 24-30. The New Jersey Group also concedes that a shareholder has standing to sue where he demonstrates the violation of an independent duty owing to that shareholder, even if the wrongdoer's actions have simultaneously harmed both the shareholder and the corporation.[1] *See also* Initial Brief at 40-43. The New Jersey Group does not challenge that Beck's allegations are sufficient to bring them under the exceptions, but instead argues only that the evidence is insufficient. The record, however, belies this argument.

First, the New Jersey Group contends that Beck admitted that the misrepresentation/fraudulent omission that he would continue as CEO was not material because he made a conscious decision to remain at SIG after he was removed from this position. The New Jersey Group's citation to the record, R6-165-Ex B at 58, however, does not support this proposition. Regardless, Beck testified that, if not for his belief that he would continue to be

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[1] Thus, the New Jersey Group's citation of cases holding that creditors and shareholders may not bring derivative claims is misplaced, as Beck's fraudulent inducement claims assert violations of direct and independent duties owed to Beck personally, not derivatively.

CEO, he would not have extended the loan or purchased the stock (R5-161-Ex 13 at 63-64). The fact that Beck may have decided to try to make the best of things and honor his contract by staying on after he was removed as CEO does not conflict with this testimony. "A fact is material if but for the alleged non-disclosure or misrepresentation the complaining party would not have entered into the transaction." *Hauben v. Harmon*, 605 F.2d 920, 924 (5th Cir 1979). The issue of the materiality of an alleged non-disclosure or misrepresentation is a question of fact for the jury, especially where the evidence on the issue is, as here, controverted. *Id.*

The fact that Beck was not guaranteed that he would forever hold the CEO position is also not dispositive. A jury could reasonably find that Beck was entitled to believe that he had been given an opportunity at the CEO position, even if his employment agreement did not mandate such an outcome, especially given that SIG's By-laws mandated that SIG's President would also be its CEO (R5-162-Ex 45 at §4.4). When the evidence is controverted, the issue of reasonable reliance on false representations or omissions is a question of fact for the jury, not one to be determined on summary judgment. *Wolff v. Allstate Ins. Co.*, 985 F.2d 1524, 1531 (11th Cir. 1993); *Souran v. Travelers Ins. Co.*, 982 F.2d 1497, 1505 (11th Cir. 1993).

Next, for the first time on appeal, the New Jersey Group challenges the evidence of the fraudulent concealment of its plans to remove Beck as CEO. These evidentiary objections have been waived. *See, e.g., Munoz v. International Alliance of Theatrical Stage Employees*, 563 F.2d 205, 297 n.1 (5th Cir. 1977) (waiver of objections to evidence at summary judgment is subject to same rules

applicable at trial); *Davis v. Howard*, 561 F.2d 565, 569-70 (5th Cir. 1977) (unchallenged evidence otherwise inadmissible may be considered on summary judgment); *Lawson v. American Motorists Ins. Corp.*, 217 F.2d 724, 726 (5th Cir. 1954) (evidentiary objections not raised to district court are waived); *Auto Drive-Away Co. of Hialeah, Inc. v. I.C.C.*, 360 F.2d 446, 448-49 (5th Cir. 1966) (objections to formal defects of evidence cannot be raised for first time on appeal); *In re Assoc. Bicycle Service, Inc.*, 128 B.R. 436, 441-42 (Bnkr. N.D.Ind. 1990) (same).

Moreover, Waldron's deposition, challenged as hearsay, reflects a statement made by R. Prupis, a co-defendant and alleged co-conspirator. Accordingly, the statement would be admissible, even if there had been an objection below. *See* Fed.R.Evid. 801(d)(2); *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1563 (11th Cir. 1991) (statement by party is not hearsay); *U.S. v. McDonald*, 935 F.2d 1212, 1220 (11th Cir. 1991) (co-conspirator statements admissible).

The New Jersey Group fails to even mention the other proof presented by Beck in support of this point: that within a week of the Private Placement Offering's closing, Beck was ousted from the CEO position (R5-161-Ex 14 at 16, 49-50; R5-161-Ex 16 at 24-25; R5-161-Ex 17 at 148-50). This action evidences a prior agreement and intention to strip Beck of the CEO title – an agreement hidden from Beck.

Also for the first time on appeal, the New Jersey Group attacks the evidence presented by Beck that the New Jersey Group fraudulently concealed from Beck the

fraudulent representations they made to indemnify contractors. The New Jersey Group contends that Beck does not support these allegations with record evidence but merely relies on his pleadings. This contention is false. First, the pleadings cited were verified, and, as such, can be considered as summary judgment evidence. *Resolution Trust Corp. v. Starkey*, 41 F.3d 1018, 1024 (5th Cir. 1995); *Munz v. Michael*, 28 F.3d. 795, 798 (8th Cir. 1994) ("[a] verified complaint is the equivalent of an affidavit for summary judgment purposes."). The New Jersey Group also chooses to ignore the evidence submitted by Beck on this issue beyond these verified pleadings. *See* R5-160-Ex 9 at 32-33; R5-161-Ex 34 at 107-15; R5-162-Ex 54 at 2-3; R5-161-Ex 20 at 2-3; R5-161-Ex 30 at 4, 6.

III. BECK HAS STANDING TO ASSERT HIS PERSONAL GUARANTY CLAIM.

The New Jersey Group's first argument on this point, that Beck has no evidence that his damages exceeded the $425,000 he received in settlement, improperly places burdens on Beck. The party moving for summary judgment has the initial burden of demonstrating that no genuine issues of material fact remain to be tried. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Id.* "[U]nless the movant meets its burden . . . the obligation of the opposing party does not arise even if no opposing evidentiary material is presented by the party opposing the motion." *Id.* at 607.

"Even after *Celotex*, it is never enough simply to state that the non-moving party cannot meet its burden at trial." *Id.*

Here, the evidence presented by the New Jersey Group failed to demonstrate the absence of questions of fact. The Settlement Agreement, the sole evidence presented by the New Jersey Group on this issue, merely establishes that $425,000 was paid to settle numerous claims. Moreover, on its face, the Settlement Agreement raises issues of fact relating to allocation of the proceeds. Accordingly, the burden never shifted to Beck.

Had the burden shifted, Beck would have filed evidence relating to the amount of his fees. In fact, the invoices that demonstrated that the damages exceeded $800,000 were produced to the New Jersey Group. As this evidence was already in its hands, the New Jersey Group chose not to challenge Beck's statement that the fees exceeded $800,000 in the lower court. Any objections were thereby waived. *See supra* at 4-5. The New Jersey Group should not be allowed to benefit from not making an argument below. *See Goka v. Bobbitt*, 862 F.2d 646, 650 (7th Cir. 1988) (summary judgment motion improper when party obtained knowledge through discovery or otherwise that a material factual dispute exists but hopes opposing party will be unable to meet its burden).

The New Jersey Group next challenges the recovery of legal fees as RICO damages. *See* Answer Brief at 28. The true holding of most of the cases cited, however, is that legal fees may constitute RICO damages if proximately caused by a RICO violation. *See* Initial Brief at 31; *especially Alexander Grant & Co. v. Tiffany Ind.*, 742 F.2d 408, 411 (8th Cir. 1984), *vacated but readopted in*, 770 F.2d

717 (1985) (legal fees resulting from predicate acts recoverable under RICO even if not an intended consequence or integral component of scheme).

Proximate cause does not mean the "sole cause," but "[i]nstead, a factor is a proximate cause if it is 'a substantial factor in the sequence of responsible causation." *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir.), *modified*, 30 F.3d 1347 (1994), *cert. denied*, 115 S.Ct. 900 (1995). "But-for" causation coupled with reasonably foreseeable harm to the plaintiff is sufficient to establish proximate cause. *See, e.g., Tieder v. Little*, 502 So.2d 923, 925-26 (Fla. 3d DCA 1987). "It is not necessary . . . that the defendant foresee the exact sequence of events which led to the [harm] sued upon; it is only necessary that the general type of [harm] which has occurred was within the scope of the danger created by the defendant. . . . " *Id.* at 926. Beck's attorneys' fees damages were, thus, proximately caused by the New Jersey Group's RICO violations. When the New Jersey Group fraudulently induced Beck to guaranty the loan, it was foreseeable that Beck would have to eventually expend attorneys' fees defending against a lawsuit. This is especially true, given that 1) it was the New Jersey Group's RICO conduct that eventually caused SIG's collapse; and 2) Beck had a duty to mitigate his damages. *See Bieter Co. v. Blomquist*, 987 F.2d 1319, 1329 (8th Cir.), *cert. denied*, 114 S.Ct. 81 (1993).

Moreover, the New Jersey Group's argument would effectively nullify this Court's decision in *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1531 & n.2 (11th Cir. 1987), which conveyed RICO standing to persons fraudulently induced into entering a guaranty. Such standing

would be illusory if denied to victims successful in mitigating their damages, as their only remaining damages may well be the costs of that mitigation.

The New Jersey Group also argues that Beck failed to present any competent evidence of fraud. First, the New Jersey Group completely ignores Beck's evidence supporting his argument that the Group fraudulently concealed from Beck the illegal manner in which SIG was operated (extortion of contractors), and that had this information not been secreted from Beck, he would not have entered the Guaranty. *See* Initial Brief at 13-14. This is an independent factual basis for Beck's claim which, standing alone, should defeat summary judgment.

Regardless, the New Jersey Group's attacks on Beck's other factual support distort the record. The New Jersey Group erroneously argues that Beck conceded that he never received *any* false financial projections from them prior to signing the guaranty. The only proof proffered on this point is an isolated passage from Beck's deposition in which Beck testifies that he may not have received *one* particular financial estimate shown to Beck at the deposition (R5-138-Ex 15 at 120-21). The New Jersey Group ignores the many other false financial statements on which Beck did rely in extending the guaranty (R5-160-Ex 18 at ¶2; R5-160-Ex 1 at ¶¶18-22; R1-25 at 3-5).

The New Jersey Group further argues that Beck testified during deposition that he had full knowledge of the Chief situation. This reasonable reliance argument is a question of fact for the jury. *Wolff*, 985 F.2d at 1531; *Souran*, 982 F.2d at 1505. Furthermore, the New Jersey Group ignores the evidence that Beck was unaware of the

most material fact which gives rise to this claim: Chief was in reality an actual loss to SIG, something the Defendant Directors hid from Beck (R5-161-Ex 18 at ¶3; R5-160-Ex 10 at 72-73). While Beck may have known that funds were being disbursed to Chief and may have seen some indication of Chief's default, the Defendant Directors portrayed Chief as a contractor who had a short term cash flow problem (R5-160-Ex 10 at 126), and assured Beck that SIG was "going to get repaid all [its] money" (*Id.*). Beck did not know and, given the information available to him, could not have known that Chief was a true loss and not an asset (*Id.* at 126-27; R5-161-Ex 13 at 31-32; R5-161-Ex 18 at ¶3; R5-161-Ex 30 at 8).

Finally, the New Jersey Group attacks Beck's evidence that he was induced to enter the Guaranty by the concealment of the decision to terminate him as SIG's President. The evidence presented by Beck, however, is sufficient to create issues of fact requiring resolution by a jury. Initial Brief at 13-14.[2]

Thus, the cases cited by the New Jersey Group in which the record evidence was amenable to only one interpretation – that plaintiff had not relied on defendants' representations – are not applicable. *See, e.g., Pelletier v. Zweifel*, 921 F.2d 1506 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991). In the present case, issues of fact remain.

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[2] Once again, the New Jersey Group selectively attacks certain evidence as hearsay. The attack is misplaced and untimely. *See, Rock v. Huffco Gas & Oil Co., Inc.*, 922 F.2d 272, 281 (5th Cir. 1991) (statement by party's agent is non-hearsay); *see also supra* at 4-5 (waiver of evidentiary objections).

IV. BECK HAS STANDING AS A WHISTLE BLOWER.

A. Section 1962(d) Does Not Require Predicate Act Injury.

The New Jersey Group's Answer Brief distorts the central point of §1962(d): "a conspiracy to violate RICO's substantive provisions is itself a violation of RICO . . . ; [Therefore,] a person injured 'by reason of' the conspiracy has been injured 'by reason of' the RICO violation." *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 348-49 (7th Cir. 1992). This is all that is required for standing under §1964(c). *Id.* at 349.

The New Jersey Group argues that the Court should ignore the RICO statute's unambiguous wording because permitting recovery under §1962(d) for non-predicate act injuries "would render most of RICO meaningless" by providing recovery for acts other than the predicate acts which Congress deliberately enumerated. Answer Brief at 41. In the absence of a "clearly expressed legislative intent to the contrary," however, a statute's unambiguous language must be regarded as conclusive. *U.S. v. Turkette*, 452 U.S. 576, 580 (1981). By merely pointing to the list of predicate acts enumerated by Congress in §1961(1), the New Jersey Group has failed to demonstrate the "clearly expressed legislative intent" required to contravene RICO's unambiguous language. Moreover, had Congress wished to limit recovery to harm caused by the commission of predicate acts, it could have written the statute to affirmatively reflect such a limitation. *Schiffels*, 978 F.2d at 349-50. Instead, §1964(c) allows suits by anyone injured by a violation of §1962. *Id.* The language of the statute is clear. *See* Initial Brief at 36-38.

Without any support, the New Jersey Group assumes that the predicate acts themselves are the sole target of RICO. Recovery under §1964(c), however, should not be artificially limited to predicate act injury, especially in light of the legislative statements about RICO serving as a tool for "attacking crime on all fronts." *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 105 S.Ct. 3275, 3286 (1985). §1964(c) does attack crime on many fronts, providing recovery for much more than mere predicate act injury. §1962(a) targets the use or investment of racketeering income; recovery under this section is therefore limited to harm flowing from such use or investment and *not* from the commission of the predicate acts themselves. *See Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989). Similarly, §1962(b) provides recovery for injury flowing from the acquisition or maintenance of an interest in or control of an enterprise through racketeering activity, and not from the predicate acts themselves. *See, e.g., Danielsen v. Burnside-Ott Aviation Training Center*, 941 F.2d 1220, 1231 (D.C.Cir. 1991).

In §1962(c), Congress provided a remedy for injuries caused by the commission of predicate acts. *Sedima*, 105 S.Ct. at 3286. In contrast, §1962(d), like subsections a and b, on its face targets conduct that is separate from the predicate acts themselves – conspiracies. Thus, placing a predicate act requirement on §1962(d) would not only impermissibly disregard RICO's plain meaning, but also would disrupt Congress' multifaceted scheme to combat crime.

B. The 1962(d) Violations Proximately Caused Beck's Injuries.

For the first time, the New Jersey Group now challenges Beck's conspiracy claim on factual grounds. As such, this argument should not even be considered. *See infra* at 21-22. Had the New Jersey Group challenged Beck's facts supporting his claim before the District Court, Beck would have submitted substantial additional evidence on this point, as he did in his opposition to Littenberg's Motion for Summary Judgment (R5-134).

Moreover, the New Jersey Group's argument ignores the law. "Because conspiracies are carried out in secret, direct proof of agreement is rare." *U.S. v. Koenig*, 856 F.2d 843, 854 (7th Cir. 1988). Often, no one outside of the conspirators "could be expected to have knowledge of the conspiracy." *Kraemer v. Grant County*, 892 F.2d 686, 690 (7th Cir. 1990). The existence of a conspiracy and a defendant's agreement to be part of it can be proven wholly from the conduct of the alleged co-conspirator or from circumstantial evidence of the scheme. *U.S. v. Church*, 955 F.2d 688, 695 (11th Cir. 1992). Accordingly, conspiracy cases are ill-suited for disposition via summary judgment, and where the facts are controverted, as is the case here, the evidence should be evaluated by a jury. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1961).

The New Jersey Group's argument also ignores the record evidence already proffered, including that Beck was beginning to thwart the conspiracy prior to his termination, establishing the conspirators' motive to wrongfully terminate Beck. *See* Initial Brief at 15. Furthermore,

the evidence demonstrates that 1) Beck's power within SIG and his access to important company information were systematically cut off, 2) it was known well in advance at SIG that Beck would be fired, and 3) the conspirators unanimously voted to terminate Beck. *Id.* at 14-16. This evidence precludes summary judgment. *See, e.g., Smith v. Our Lady of the Lake Hospital, Inc.*, 960 F.2d 439, 445-46 (5th Cir. 1992) (evidence that defendants fired doctor for reasons other than his lack of medical skill supported finding of conspiracy); *Montgomery v. Hughes*, 716 F.Supp. 261, 263 (S.D. Miss. 1988) (motive is "an issue appropriately resolved by the jurors' assessment of the credibility of [testimony]").

The New Jersey Group also seeks to bootstrap its argument on the dismissal of Firemark. Firemark's role in the conspiracy, however, is not critical to Beck's claim, but simply provides further evidence of the New Jersey Group's involvement in the conspiracy. The new evidence that Firemark's principal, Joanne Morrissey, fabricated grounds for Beck's termination because she wanted Beck's job establishes evidence of the conspiracy, given that, as her payoff, she was given Beck's job after his termination (R5-161-Ex 16 at 80-81; R5-162-Ex 48 at 372-73).[3]

The New Jersey Group also seeks to ignore the direct evidence of its participation in secret meetings. *See* R5-134-Ex J at #30; R5-134-Ex K at 13; R7-205 at 65-66. This provides circumstantial evidence of the conspiracy.

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[3] Once again, the New Jersey Group makes a selective, improper and untimely attack on certain evidence as hearsay.

See, e.g., Crowe v. Lucas, 595 F.2d 985 (5th Cir. 1979); *Thomas v. City of New Orleans*, 687 F.2d 80 (5th Cir. 1982); *Ferguson v. Omnimedia, Inc.*, 469 F.2d 194, 197 (1st Cir. 1972); *Epprecht v. Delaware Valley Machinery, Inc.*, 407 F.Supp. 315, 323 (E.D. Penn. 1976) (evidence of secret meetings provided grounds from which factfinder could infer existence of conspiracy).

V. BECK HAS STANDING TO PURSUE HIS FAILURE TO SELL STOCK CLAIM.

The New Jersey Group's citations and arguments fail to respond to the crux of Beck's claim for fraudulent inducement not to sell his SIG stock: unlike other shareholders, the New Jersey Group had a duty to disclose to Beck, given its business relationship with him. The evidence supports Beck's claim. *See, e.g.*, R5-160-Ex 9 at 55 (had the information not been fraudulently concealed, Beck would have stopped the illegal activity, as he had in the past, and then sold his stock).

Furthermore, under the law of this Circuit, Beck's damages are not too speculative. As long as the plaintiff can make a showing that the defendants are responsible for his damages, a wrongdoer cannot escape liability simply because the harm he caused is difficult to precisely value. *Burger King Corp. v. Mason*, 710 F.2d 1480 (11th Cir. 1983), *cert. denied*, 465 U.S. 1102 (1994). If, as here, the defendants, by their wrongdoings, have prevented precise computation of damages, a reasonable estimate of damages based on the relevant data available

is proper. *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962).[4]

VI. THE PATTERN ARGUMENT DOES NOT PROVIDE A BASIS FOR AFFIRMING.

A. Pattern Includes Predicate Acts Committed Against Others.

"Separate acts of fraud on various separate parties" can constitute a pattern under RICO. *S.J. Advanced Technology & Manufacturing Corp. v. Junkunc*, 627 F.Supp. 572, 577 (N.D.Ill. 1986). Where a RICO violator has more than one victim, "each victim can sue the RICO violator, adducing *evidence* of the offense against the other victim to meet the proof requirements of the statute as to 'pattern.' " *Papaginaais v. Pontikis*, 108 F.R.D. 177, 179 (N.D.Ill. 1985); *see also Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806, 809-10 (7th Cir. 1987) (noting absence of even one case where a civil RICO plaintiff was precluded from recovering damages because he failed to show injury resulting from *all* of the predicate acts constituting the pattern).

A contrary holding would undermine RICO's purpose:

> For example, [under Defendants' view of the law,] if an organized crime group were to operate a protection racket, extorting money from

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[4] Through expert testimony, Beck's damages can be reasonably estimated from the average value of SIG's stock for the applicable period, without reference to illegal activities.

> each merchant in a community, then each merchant's injury would be separate, and therefore, . . . none could recover.

Town of Kearny v. Hudson Meadows Urban Renewal, Corp., 829 F.2d 1263, 1268 (3d Cir. 1987) (it is only necessary to prove harm from *any* predicate act). Thus, the New Jersey Group's unsupported arguments to the contrary should be rejected.

B. Beck Has Fulfilled The Pattern Requirement.

RICO's pattern requirement is comprised of two elements, "continuity plus relationship." *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). Beck has satisfied both of these elements.

1. The predicate acts are "related."

The test for determining whether predicate acts are related for the purposes of RICO's pattern requirement is as follows:

> [C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

Id. at 240. The test for relatedness is broad, and is not a cumbersome one for a RICO plaintiff. *Banks v. Wolk*, 918 F.2d 418, 422 (3d Cir. 1990). In order for predicate acts to be related, they must merely bear *some* relationship to each other. *Purvis v. Hamwi*, 828 F.Supp. 1479 (D-Col.

1993). Various schemes employing different techniques may constitute a pattern if they have the same general goal. *Wolk*, 918 F.2d at 424. "[I]f too close a relationship among multiple schemes is required, cases within RICO's intended ambit may be improperly dismissed." *Id.*

This relatedness requirement can be met by showing either that the predicate acts are related to each other, or that they are related to an external event or circumstance. *Koal Indus. Corp. v. Asland, S.A.*, 808 F.Supp. 1143 (S.D.N.Y. 1992). Thus, the "relatedness requirement is satisfied even if the predicate acts are not directly related to each other so long as both are related to the RICO enterprise in such a way that they become indirectly connected to each other." *U.S. v. Locascio*, 6 F.3d 924, 943 (2d Cir. 1993), *cert. den.*, 114 S.Ct. 1646 (1994).

The predicate acts committed directly against Beck were not isolated, but instead formed a collection of similar and related events. The fraudulent schemes and actions targeted Beck as one of the intended victims. The predicate acts were all committed by the same or similar defendants. The predicate acts committed, mail and wire fraud, were the same in each scheme.

Similarly, the substantial number of predicate acts directed against other victims are sufficiently related to form part of the same general pattern. The illegal conduct against others often made up the substance of the misrepresentations and omissions which formed the basis for the mail and wire fraud committed against Beck. For example, the extortion of contractors and the falsified financial information were both kept from Beck, and had this information been known to him, Beck would not

have suffered some of his damages (R5-161-Ex 18 at ¶3; R5-160-Ex 10 at 75, 125-27).

All of the predicate acts alleged relate to the operations of SIG and the Defendant Directors' role in its affairs. All of the predicate acts arose from the same conspiracy between the Defendant Directors. The predicate acts, whether mail fraud, wire fraud or extortion, were all driven by the same or similar purposes: to illegally obtain benefits through SIG for the enterprise and its members.

These similarities among the predicate acts are sufficient to establish relatedness under RICO's pattern requirement. *See, e.g., U.S. v. Grubb*, 11 F.3d 426 (1993) (predicate acts were related where purpose in each case was to elect candidates supported by illegal campaign contributions, and the result in each was election by means of illegal plan), *aff'd*, 65 F.3d 167 (4th Cir. 1995); *U.S. v. McDade*, 827 F.Supp. 1153 (E.D.Pa. 1993) (predicate acts of accepting bribes were related to Congressman's office so as to establish that activities of office were conducted through pattern of racketeering activity, even where more than one scheme was alleged involving multiple sources of bribes), *aff'd*, 28 F.3d 283 (1994), *cert. denied*, 115 S.Ct. 1312 (1995).

2. The predicate acts are "continuous."

"Continuity" is both a closed and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that, by its nature, projects into the future with a threat of repetition. *H.J., Inc.*, 492 U.S. at

241. The continuity element may be established by proving a series of related predicate acts over a substantial period of time. *Colonial Penn Ins. Co. v. Value Rent-A-Car, Inc.*, 814 F.Supp. 1084 (S.D. Fla. 1992). The continuity requirement may also be satisfied by a showing that the predicate acts are a regular way of conducting the defendants' ongoing business or enterprise. *H.J., Inc.*, 492 U.S. at 243. Proof that defendants were involved in multiple schemes is indicative of the continuity of the defendants' racketeering activity. *Id.* at 240.

Beck presented evidence of several interrelated, overlapping schemes to defraud him and others in furtherance of an overall racketeering conspiracy. Pursuant to these schemes, among other things, the New Jersey Group fraudulently induced Beck to make an unsecured loan and to buy stock in August 1986 and to be a personal guarantor in December 1987. Further, Beck was merely one of the New Jersey Group's many victims.

The Defendant Directors' racketeering conduct included mail fraud, wire fraud and extortion conducted over a several year period, commencing in the Fall of 1985 and continuing until, at least, after Beck was terminated in May of 1988. *See generally* R5-159 and R5-163. This conduct satisfies the continuity requirement. *See, e.g., Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986) (nine acts of mail and wire fraud over 3-year period satisfies continuity requirement); *Colonial Penn*, 814 F.Supp. 1084 (acts of mail and wire fraud over 2-years satisfies continuity requirement); *Ticor Title Ins. Co. v. Florida*, 937 F.2d 447 (9th Cir. 1991) (same – three forgeries over 13 months); *U.S. v. Stodola*, 953 F.2d 266 (7th Cir. 1992) (same – several bribes over 20 months).

C. The Pattern Argument Should Not Be Considered.

The New Jersey Group admits that the District Court declined to address its argument that Beck could not meet RICO's pattern requirement, but asserts that this argument provides a proper basis for affirming the opinion below. This is contrary to the general rule that issues not considered by the district court should not be considered on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir.), *cert. denied*, 116 S.Ct. 74 (1995); *Topalian v. Ehrman*, 954 F.2d 1125, 1131-32 n.10 (11th Cir.), *cert. denied*, 506 U.S. 825 (1992).

The lower court properly declined to consider the pattern argument, which was raised for the first time in the New Jersey Group's Reply Memorandum in Support of its Motion for Summary Judgment (R5-164 at 5-6, 8). New arguments should not be made for the first time in a reply memorandum. *See, e.g., Gold v. Wolpert*, 876 F.2d 1327, 1331 (7th Cir. 1989); *Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1332 (9th Cir. 1981); *Miss. River Corp. v. F.T.C.*, 454 F.2d 1083, 1093 (8th Cir. 1972).

VII. THE LOWER COURT ERRED IN DISMISSING BECK'S PENDENT CLAIMS.

The New Jersey Group's Answer Brief ignores Beck's central argument regarding reversal of the dismissal of his pendent claims: that the lower court abused its discretion by applying an inapplicable statute and by not conducting the required inquiry under the appropriate

common law, including taking into account the statute of limitations bar that now exists as to Beck's state claims. The Answer Brief at 46-47 cites only to a Ninth Circuit case, ignoring the unambiguous Eleventh Circuit precedent cited in Beck's Initial Brief at 47-48, which holds that dismissal of the state claims once the limitations period has run constitutes an abuse of discretion. Moreover, unlike the plaintiff in *Notrica v. Board of Supervisors*, 925 F.2d 1211, 1215 (9th Cir. 1991), the case cited by the New Jersey Group, Beck did not simultaneously file his claims in both state and federal court, but rather, voluntarily dismissed his claims in Florida state court and re-alleged them as cross-claims in New Jersey federal court so that he would not be forced to litigate the identical complex issues in two separate forums.

The New Jersey Group also asserts that Beck is to blame for his predicament because Beck engaged in forum shopping and dilatory behavior. These are unsupported and false conclusions drawn only by the New Jersey Group. *See* R6-191 at 6-7.

VIII. THE LOWER COURT ERRED IN DISMISSING THE SPARBER CLAIMS.

Even after Sparber's Answer Brief, the following facts remain undisputed: 1) M&S filed a Notice of Appearance on behalf of Sparber; 2) M&S participated in all phases of pretrial activity in this case; 3) M&S represented Sparber in at least five other Florida actions relating to SIG; 4) M&S represents Sparber now in this action; and 5) Sparber waited approximately 4 years after the

filing of the Notice of Appearance to challenge the service upon him. Given these facts, the lower court erred in granting Sparber's Motion to Dismiss.

Sparber claims that M&S did not know that it had filed the Notice of Appearance on behalf of Sparber – but it was M&S that filed the document. Sparber also makes much of the fact that M&S was counsel for Littenberg and that M&S's participation in the litigation was on behalf of Littenberg, not Sparber. Beck, however, had no way of knowing that Sparber considered himself not to be a party or that he was waiting until after the statute of limitations had passed to challenge service.

Sparber continues to deny the existence of an attorney-client relationship. The applicable law, however, remains undisputed – even where the alleged principal and agent both deny the existence of an agency relationship, the trier of fact is entitled to infer the existence of such a relationship from the facts and circumstances of the case. *Overseas Private Investment Corp. v. Metropolitan Dade County*, 826 F.Supp. 1564, 1576 (S.D.Fla. 1993), *aff'd in part, rev'd in part on other grounds*, 47 F.3d 1111 (11th Cir. 1995); *Watkins v. Sims*, 88 So. 764 (Fla. 1921); *Singer v. Star*, 510 So.2d 637, 640 (Fla. 3d DCA 1987). Nothing in Sparber's Brief even addresses Beck's argument that the lower court erred by assuming that Beck was not contesting whether M&S actually represented Sparber throughout the litigation and by not evaluating the evidence of the relationship's existence.

Contrary to Sparber's bald assertion, the Notice of Appearance filed by M&S on Sparber's behalf is not the

only record evidence of the ongoing attorney-client relationship between Sparber and M&S. Specifically, M&S represented Sparber in at least five other related actions in Florida, all of which revolve around Sparber's involvement in SIG. It is inconceivable that M&S was not keeping Sparber informed, actively advising him and safeguarding his interest in this action.

Mandler never advised Beck that M&S did not represent Sparber in this matter. On the contrary, upon receiving notice that Beck intended to take Sparber's deposition, Mandler immediately responded that Sparber had not been properly served and that Beck would be required to obtain a subpoena, indicating that M&S was handling the matter for Sparber. See Answer Brief of Sparber at 3. This was consistent with M&S's numerous other representations of Sparber. In fact, Mandler's Affidavit fails to deny the existence of such a relationship (R2-64-Ex B).

Moreover, Sparber does not deny, nor could he, that if M&S's substantial participation in this litigation prior to the filing of Sparber's Motion to Dismiss were imputed to him, Sparber would be deemed to have waived his service of process defense. Sparber's argument, that M&S only asked questions regarding Littenberg during the numerous depositions it attended (Sparber's Answer Brief at 11-12), proves too little, as it does not deny that through M&S's participation in discovery and other pretrial proceedings, Sparber was able to keep intimately in touch with the litigation. By so doing, M&S enabled Sparber "to lie in wait and ambush [Beck] on the eve of trial, after years of discovery, at a time when it was too late for [Beck] to refile the claim due to the expiration of

the statute of limitations. . . . " *Beneviste v. Eiseman*, 119 F.R.D. 628, 630 (S.D.N.Y. 1988). This is simply not permissible. *See, e.g., Id.; Santos v. State Farm Fire and Cas. Co.*, 902 F.2d 1092, 1096 (2nd Cir. 1990); *Norling v. Valley Contracting and Pre-Mix*, 773 F.Supp. 186, 188 (D.N.D. 1991).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail on this 1st day of April, 1996 to all counsel on the attached service list.

By: /s/ Jay Starkman
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**Opinion of the U.S. Court of Appeals,
Eleventh Circuit in Case Nos. 95-4844, 95-5586**

The full text of the Opinion appears in the Appendix to Petitioner, Robert A. Beck, II's, Petition for Writ of Certiorari at pages App. 1 – App. 22 and is, therefore, not duplicated in this Joint Appendix